Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

_____✦_____

MARK R. TUGMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

_____✦_____

On Petition for Writ of Certiorari To The United States Court of Appeals For the Eleventh Circuit

_____✦_____

PETITION FOR WRIT OF CERTIORARI AND APPENDIX
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_____✦_____

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QUESTIONS PRESENTED FOR REVIEW

I. Did the court of appeals exceed its authority in creating, and applying as to petitioner, a mandatory procedural default rule - which bars all Eleventh Circuit panels, in all cases, criminal and civil, from considering issues not raised in the appellant's initial brief, such that all motions for leave to file a supplemental brief raising a previously unbriefed issue must be denied - where this non-discretionary rule contravenes the retroactivity principles of *Griffith v. Kentucky*, 479 U.S. 314, 07 S.Ct. 708 (1987), in relation to the applicable date of finality of the appeal; conflicts with the "ordinary prudential doctrines" approved by this Court in *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738, 769 (2005); conflicts with the discretionary and prudential approach of the other circuits as to newly-raised issues; violates Fed. R. Crim. P. 52(b)'s guarantee of plain error review, and this Court's precedents underlying that rule; and undermines sound public policy arising from the mandatory availability of appellate jurisdiction?

II. Did the court of appeals err in failing to apply the "reasonableness" standard of review mandated for all Federal Sentencing Guidelines appeals by this Court's decision in *Booker*?

III. Did the court of appeals err by either refusing to apply Fed. R. Evid. 408 in this criminal case or by erroneously finding that the extensive testimony and argument about civil settlement discussions admitted in violation of Rule 408 did not constitute plain error?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The Petitioner in this case is Mark R. Tugman. The Respondent in this case is the United States of America.

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States v. Booker, 543 U.S. __, 125 S.Ct. 738, 769 (2005); conflicts with the discretionary and prudential approach of the other circuits as to newly-raised issues; violates Fed. R. Crim. P. 52(b)'s guarantee of plain error review, and this Court's precedents underlying that rule; and undermines sound public policy arising from the mandatory availability of appellate jurisdiction. 6

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PETITION FOR WRIT OF CERTIORARI

Mark R. Tugman respectfully petitions the Supreme Court of the United States for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit, rendered and entered in United States v. Mark R. Tugman, case number 03-16404-FF in that court on January 14, 2005, which affirmed the judgment of the United States District Court for the Middle District of Florida.

OPINIONS AND JUDGMENTS IN THE COURTS BELOW

A copy of the decision of the United States Court of Appeals for the Eleventh Circuit, which affirmed the judgment of the United States District Court for the Middle District of Florida, is contained in the Appendix (App. 1). Also included in the appendix are the Court of Appeals Order denying Tugman's Second Renewed Motion for Bond Pending Appeal (August 4, 2004) (App. 14); the Court of Appeals Order denying Tugman's Motion to Remand for Resentencing (September 8, 2004) (App. 33); and the Court of Appeals Order denying Tugman's Motion for Limited Remand for Resentencing Pursuant to *Booker/Fanfan* (February 23, 2005) (App. 38).

STATEMENT OF JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Part III of the Rules of the Supreme Court of the United States. This petition is timely filed pursuant to Sup. Ct. R. 13.1.

STATUTORY AND OTHER PROVISIONS INVOLVED

Petition intends to rely upon the following constitutional provisions, treaties, statutes, rules, ordinances and regulations:

U.S. Const. Amend. VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Fed. R. Crim. P. 52(b):

> Plain error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Evid. 408:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or

> its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

Fed. R. Evid. 1101(b):

> **(b) Proceedings generally**. These rules apply generally to civil actions and proceedings, including admiralty and maritime cases, to criminal cases and proceedings, to contempt proceedings except those in which the court may act summarily, and to proceedings and cases under title 11, United States Code.

STATEMENT OF THE CASE

Petitioner Mark R. Tugman was convicted after trial of possessing counterfeit company checks in violation of 18 U.S.C. § 513(a) which his girlfriend/wife Cheri Searcy had altered after obtaining them as part of her job as a bookkeeper for Patrick K. Neal & Associates;[1] of making two false loan

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[1] Searcy embezzled approximately $1.9 million from Patrick K. Neal & Associates. It is undisputed that Tugman never altered, deposited or negotiated any of these Neal & Associates checks. (App. 57 and App. 59). Tugman did, however, benefit from Searcy's embezzlement both because Searcy paid Tugman's American

applications in violation of 18 U.S.C. § 1014; of money laundering in violation of 18 U.S.C. § 1957; and of conspiring to violate Sections 513(a), 1014 and 1957. The district court sentenced Tugman to 41 months imprisonment based on its determination of the loss amount and its decision to apply a two level obstruction of justice enhancement under USSG. §3C1.1. Tugman objected to the district court's calculation of the loss amount and objected to the factual basis for imposition of the obstruction enhancement. At sentencing, Tugman also objected to the imposition of forfeitures because these forfeitures were not imposed by the trial jury. Mr. Tugman did not raise an *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348 (2000) objection at sentencing.

In his initial appeal brief filed on March 28, 2004, Tugman argued that the district court's loss calculation and its determination that he had obstructed justice were clearly erroneous. Tugman also argued for a new trial on the grounds, *inter alia*, that the district court committed plain error by permitting the prosecution, without objection, to introduce civil settlement negotiations as direct admissions of guilt in violation of Fed. R. Evid. 408. Shortly after this Court's decision in *Blakely v. Washington,* 542 U.S. __ , 125 S.Ct. 2531 (2004), Tugman filed a Second Renewed Motion for Bond Pending Appeal (App. 4) seeking release on bond pending appeal because none of the enhancements which increased his sentence beyond the base offense level (loss amount; more than minimal planning; and obstruction of justice) were proven to

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Express and Major Jewelers accounts with funds she had embezzled and because Tugman lived in a house and drove expensive cars which Searcy purchased using embezzled funds. Although admitting that Tugman never had actual possession of the charged altered checks, the prosecution argued that Tugman possessed them constructively when they were deposited into some of his accounts. (App. 59 and App. 61).

the trial jury, as required by *Blakely* and the Sixth Amendment. The Eleventh Circuit denied this motion because Tugman "raised no *Blakely*-type issues in his initial brief, and this Court will not consider any issues raised outside the initial brief." (App. 14).

On August 11, 2004, Tugman filed a Motion to Strike Briefs and Order Re-Briefing of *Blakely* Argument or in the Alternative to Remand for Resentencing. (App. 15). Tugman noted that in an analogous situation, the Eleventh Circuit sitting *en banc* had permitted a second petition for habeas relief in *Moore v. Kemp,* 824 F.2d 847, 851 (11th Cir. 1987), despite the fact that the defendant did not raise that argument in his first 2254 petition, because counsel's failure to anticipate this Court's application of *Miranda* to the sentencing phase of capital proceedings was reasonable under the circumstances. Later, in a Reply, Tugman argued that a fast re-briefing schedule would permit his *Blakely* issue to be raised without delaying the ultimate resolution of his appeal because oral argument had not even been scheduled yet. (App. 28). On September 8, 2004, the Eleventh Circuit denied Tugman's motion to re-brief and his alternative motion to remand for resentencing. (App. 33).

Oral argument was held before the Eleventh Circuit on January 11, 2005. On January 12, 2005, this Court issued its opinion in *United States v. Booker,* 543 U.S. __, 125 S.Ct. 738 (2005). On January 14, 2005, the Eleventh Circuit affirmed Tugman's convictions and sentence. (App. 1). On January 18, 2005, Tugman filed a Motion for Limited Remand for Resentencing Pursuant to *Booker/Fanfan.* (App. 35). Tugman argued that this Court held that its *Booker* holdings must be applied "to all cases on direct review," 125 S.Ct. at 769, and that his case remained on direct review. Tugman also cited this Court's teaching in *Griffith v. Kentucky,* 479 U.S. 314, 322 (1987) that "failure to apply a newly decided constitutional rule

to criminal cases pending on direct review violates basic norms of constitutional adjudication."[2]

On February 23, 2005, the Eleventh Circuit denied Tugman's Motion for Limited Remand for Resentencing Pursuant to *Booker/Fanfan* without discussion. (App. 38). On February 24, 2005, the Eleventh Circuit issued its mandate denying Tugman's appeal.

REASONS FOR GRANTING THE WRIT

I. The court of appeals exceeded its authority in creating, and applying as to Petitioner, a mandatory procedural default rule - which bars all Eleventh Circuit panels, in all cases, criminal and civil, from considering issues not raised in the appellant's initial brief, such that all motions for leave to file a supplemental brief raising a previously unbriefed issue must be denied - where this non-discretionary rule contravenes the retroactivity principles of *Griffith v. Kentucky*, 479 U.S. 314, 107 S.C. 708 (1987); conflicts with the "ordinary prudential doctrines" approved in *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738, 769 (2005); conflicts with the discretionary and prudential approach of the other circuits as to newly-raised issues; violates Fed. R. Crim. P. 52(b)'s guarantee of plain error review, and this Court's precedents underlying that rule; and undermines sound public policy arising from the mandatory availability of appellate jurisdiction.

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[2]The Motion for Limited Remand for Resentencing Pursuant to *Booker/Fanfan* was filed before the Eleventh Circuit's judgment was received by undersigned counsel. Tugman's timely filing for certiorari review means his case is still on direct review. *Kapral v. United States*, 166 F.3d 565, 571 (3rd Cir. 1999) ("if a defendant files for certiorari review, direct review is ongoing").

Certiorari should be granted because the Eleventh Circuit's newly-created, non-discretionary rule prohibiting consideration of issues arising following the filing of the appellant's initial brief is inconsistent with: (1) the retroactivity principles of *Griffith v. Kentucky*, 479 U.S. 314, 107 S.C. 708 (1987), which this Court reaffirmed in *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738, 769 (2005); (2) the plain-error rule, Fed. R. Crim. P. 52(b), which codified long-standing precedent of this Court; and this Court's directive in *Booker*, that appellate review of *Booker* errors should be subject to "ordinary prudential doctrines," 125 S.Ct. at 769, such that the court of appeals' unique, non-discretionary, bar to review of a *Booker* error not raised in the initial brief unduly restricts the scope of appellate review of criminal sentences guaranteed by statute. *See* 18 U.S.C. § 3742(a).

Petitioner's sentence, imposed on the basis of mandatory sentencing guidelines exceeding the sentencing range applicable to the offense of conviction, plainly violated the Sixth Amendment under *Booker*, in that the sentencing court engaged in judicial fact finding, beyond facts necessarily found by the jury's verdict. *See id.*, 125 S.Ct. at 756. Because Petitioner did not raise this Sixth Amendment error in his initial brief, and instead sought to do so in a supplemental brief immediately following the decision in *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531 (2004), and again following the decision in *United States v. Booker*, 543 U.S. ___, 25 S.Ct. 738 (2005), the court of appeals, applying a newly-announced procedural default rule, refused to consider the sentencing error under any standard of review.

In *United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004), *rehearing en banc denied*, 391 F.3d 1327 (11th Cir. 2004), the Eleventh Circuit characterized its rule barring the appellant from attempting to raise any issue not included within the initial brief as a "procedural default rule[ ] [that] applies

neutrally to all appellants, whether the government or the defendant." The Eleventh Circuit explained that the rule does not allow an exception for plain-error review in criminal cases. *Id.* at 1244-45 ("[A]n appellant cannot raise a wholly new issue in a supplemental letter or brief;" holding that six examples of Eleventh Circuit panels which did not apply the *Levy* procedural default rule during the years 2000 and 2001 to address plain error in criminal cases must be discounted because they "conflict[ ]" with "prior panel precedent"). *See United States v. Curtis*, 380 F.3d 1308, 1310 (11th Cir. 2004) (relying on *Levy* as foreclosing supplemental briefs on new issues; *Levy* explained the "long-standing rule in this circuit, as well as in the federal rules themselves, that issues not raised by a defendant in his initial brief on appeal are deemed waived;" denying permission to file supplemental brief raising *Blakely* claim); *United States v. Hembree*, 381 F.3d 1109 (11th Cir. 2004) (motion to file supplemental brief on *Blakely* grounds deemed impermissible).

The Eleventh Circuit's non-discretionary rule **prohibiting** any panel of the court in any case from accepting the submission of authorities or argument as to errors not raised in the initial brief, notwithstanding supervening changes in governing law, conflicts with the law in every other circuit as to both pre-*Booker*[3] and post-*Booker*[4] decisions.

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[3]*See United States v. Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984) (Scalia, J.) (considering merits of constitutional claim raised for first time in rehearing petition where supervening decision made foreclosed argument "plausible"); *United States v. Terry*, 240 F.3d 65, 72-73 (1st Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in supplemental brief); *United States v. Griffith*, 385 F.3d 124, 127 (2d Cir. 2004) (ordering, notwithstanding defendant's failure to raise *Blakely*-type claim in initial brief, that case be held for merits review pending *Booker* decision); *United States v. Moore*, 109 Fed.Appx. 503, 505 n.2 (3d Cir. 2004) (unpub.) (noting that *Blakely* claim first raised in

The existence of the circuit conflict - which places defendants (and the government) in a more precarious appellate posture in the Eleventh Circuit than in any other circuit - is a

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supplemental brief would be reviewed for plain error but declining to grant motion to file such brief because it was clear defendant could not establish plain error); *United States v. Hammoud*, 381 F.3d 316, 345 & n.14 (4th Cir. 2004) (*en banc*) (appellant permitted to file supplemental brief on *Blakely* grounds); *United States v. Delgado*, 256 F.3d 264 (5th Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in supplemental brief); *United States v. Rogers*, 118 F.3d 466, 471 (6th Cir. 1997) (rejecting government's argument that defendant "waived" claim based on then-recent Supreme Court decision by failing to object at trial or advance claim in initial brief); *United States v. Schafer*, 384 F.3d 326, 330-31 (7th Cir. 2004) (allowing supplemental brief arguing *Blakely*; remanded for resentencing); *United States v. Poulack*, 236 F.3d 932, 935-37 (8th Cir. 2001) (reviewing *Apprendi* claim for plain error where defendant first raised claim in "supplemental brief"); *United States v. Castro*, 382 F.3d 927, 929 & n.3 (9th Cir. 2004) ("we have the authority to identify and consider such sentencing issues *sua sponte* [and] it would be appropriate for parties with pending cases to inform this court by letter at any time . . . when a potential *Blakely* ... issue exists"); *United States v. Cernobyl*, 255 F.3d 1215 (10th Cir. 2001) (plain-error review of *Apprendi* claim first raised in "supplemental brief").

[4] *See United States v. Bruce*, No. 03-3110, 2005 WL 241254, *4, *16-17 (6th Cir. Feb. 3, 2005) (reviewing *Booker* claim on plain-error basis where issue raised for first time in supplemental brief); *United States v. Oliver*, No. 03-2126, 2005 WL 233779, *5-6 & n.1 (6th Cir. Feb. 2, 2005) (reversing on plain-error review of *Booker* issue raised for first time in post-briefing supplemental authority letter); *United States v. Fox*, No. 03-3554, 2005 WL 195429, *7-8 (8th Cir. Jan. 31, 2005) (granting relief and remanding for resentencing under *Booker*, based on supplemental brief raising issue not addressed in initial brief); *United States v. Burgess*, No. 04-1543, 2005 WL 124523 (8th Cir. Jan. 24, 2005) (remanding in light of *Booker* based on supplemental brief raising *Blakely* issue).

compelling reason in itself for granting certiorari. But other fundamental concerns raised by the Eleventh Circuit's position offer equally important grounds for granting certiorari.

A. *Griffith v. Kentucky.*

In an opinion dissenting from the denial of *en banc* rehearing in *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) (the panel opinion in *Levy* being the principal precedent on which the court of appeals relied in denying petitioner's motion to file a supplemental brief), Circuit Judge Tjoflat explained the significant, certiorari-worthy concerns raised by the Eleventh Circuit's bar to supplemental briefing, as follows:

> The panel's decision in this case is problematic for four reasons. First it unjustifiably limits the principle of *Griffith v. Kentucky*, 479 U.S. 314, 107 S.Ct. 708 ... (1987), that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases ... pending on direct review or not yet final." *Id.* at 328, 107 S.Ct. at 716 (emphasis added). Second, by erroneously terming *Levy's* failure to raise a *Blakely* type claim in his opening brief a "waiver" rather than a mere "forfeiture," the decision unduly limits our scope of review under Federal Rule of Criminal Procedure 52(b), as interpreted by the Supreme Court in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 ... (1993). Third, it continues a circuit split that finds this court standing alone. Fourth, it sends a clear message to appellate counsel that they should brief every colorable claim - even those claims that are squarely foreclosed by our own precedent - or else risk costing their clients the benefit of a favorable intervening decision.

391 F.d at 1336-37 (Tjoflat, J., dissenting from denial of rehearing *en banc* (footnotes omitted).

Judge Tjoflat's analysis is reinforced by this Court's recognition in *Booker,* 125 S.Ct. at 769, that under *Griffith v. Kentucky*, the two rules announced in *Booker* "must" be applied to "all cases" on direct review, with the only limitation that reversibility may hinge on the application of "ordinary prudential doctrines," such as plain error.

In *Griffith v. Kentucky*, 479 U.S. at 323, 107 S.Ct. at 713, this Court explained that the rule of retroactive application (to cases not yet final) of rules announced by the Court is intended to have the courts of appeals undertake the merits review that would otherwise fall to the Court's own busy docket: "As a practical matter, [because the Court does not have the resources or time to] hear each case pending on direct review and apply the new rule," the Court "fulfill[s] [its] judicial responsibility by instructing the lower courts to apply the new rule retroactively to cases not yet final." The Eleventh Circuit's rule, blocking enforcement of this work-sharing function, mistakes its own role for that of this Court in determining the date of finality on which a new rule can no longer be automatically applicable. Thus, as Judge Tjoflat noted in his dissent in *Levy:*

> Applying [the *Griffith*] rule in criminal cases, the [Supreme Court] has never drawn distinctions among defendants on any basis other than the finality of their convictions. In *Griffith*, for example, the Court discarded the "clear break" exception to retroactivity because it concluded that the fact that a decision is a clear break with precedent simply "has no bearing on the actual inequity that results when only one of many similarly situated defendants receives the benefit of the new rule" or on the principle that a court must "not

> disregard current law[] when it adjudicates a case pending before it on direct review. *Id.* at 326-27, 107 S.Ct. at 715-16 (quoting [*United States v.*] *Johnson*, 457 U.S. [537], 556 n. 16, 102 S.Ct. [2579], 2590 n. 16 [(1982)].

391 F.3d at 1338 (footnote omitted).

Responding to Judge Tjoflat's *Griffith* objection, several members of the Eleventh Circuit observed that *Griffith* does not require that appellate courts grant full merits review of newly applicable decisions:

> Essentially, the dissent's rule would be that a new Supreme Court decision applies retroactively *per se* - even if the defendant has never raised or preserved the constitutional issue and this Court has already affirmed the defendant's conviction and sentence - as long as the defendant is still in some phase of the direct appeal process.

Levy, 391 F.3d at 1329 (Hull, J., concurring). But this objection does not justify the Eleventh Circuit's unique appellate default rule, which does not merely bar *de novo* review of newly raised constitutional issues, but bars *all* review, including, as is relevant here, review for manifest injustice and plain error, and precludes all judges of Eleventh Circuit from ever exercising discretion and prudence in deciding whether to hear a claim not initially raised.[5]

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[5] The opinion of four judges concurring in the Court's denial of *en banc* review in *Levy*, adopted the view of the concurring opinion in *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001) (in which two additional judges joined), that offered as rationale for the total bar doctrine adopted in *Levy* the circumstance that the Eleventh Circuit had not ever granted relief in any case raising a plain-error

If the Eleventh Circuit were correct that an appellate issue raised on an untimely basis received better review than, or even review equivalent to, that afforded to claims timely-preserved and timely-raised on appeal, the Eleventh Circuit's interpretation of *Griffith* would carry more weight. But such concerns are not justified by any fair reading of *Griffith*, which requires mere applicability of the new decision, without reducing the stringent limitations of Fed. R. Crim. P. 52(b).

The Eleventh Circuit's rule, however, precludes its panels from *deciding* whether a manifest injustice would occur if a *Griffith*-applicable decision were not considered on plain error review. It is this absolute-bar aspect of the Eleventh Circuit's rule that places it beyond *Griffith*'s holding.

The Eleventh Circuit's concern that a windfall will result to appellants who fail to timely raise appellate claims is wholly mistaken, for as the other circuits have recognized, the ordinary prudential concerns of Fed. R. Crim. P. 52(b) will limit relief and encourage timely assertion of rights by all litigants. *See* notes 1, 2 & 4, *supra*. For purposes of analyzing the Eleventh Circuit's rule as applied to petitioner, one must assume, as did the court of appeals, that the constitutional error

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Apprendi challenge, thereby reducing the harm of the *Levy* issue-preclusion procedural default rule. *See Levy*, 391 F.3d at 1335 (Hull, J., concurring in denial of *en banc* rehearing) ("'[o]ne of the best indications of the narrowness of plain error review is the fact that this Court has not yet found any *Apprendi* error to fit within the scope of the plain error doctrine'") (quoting *United States v. Ardley*, 273 F.3d at 992 (Carnes, J., concurring in denial of rehearing *en banc* (alteration in *Levy*)). This explanation neglects, of course, to address the fact that the total bar adopted in *Levy* applies to **all** cases, criminal and civil, not just those presenting *Apprendi* or *Booker* claims. Indeed the absence (or low rate) of plain-error reversals offers further reason why the extraordinary *Levy* rule is unnecessary to protect any appellee's interests in preserving a judgment.

in petitioner's case not only violated petitioner's substantial rights, but resulted in such a manifest injustice that the failure to correct the error would impugn the integrity of judicial review, the very concept on which this Court required retroactive review in *Griffith*. *See Griffith*, 479 U.S. at 322-23, 107 S.Ct. at 713 ("[T]he integrity of judicial review requires that we apply the rule to all similar cases pending on direct review."). The very judicial integrity concerns that underlie the Court's *Griffith* decision compel that *Griffith* not be watered down to nonexistence by an appellate court's unique procedural default rule.

B. Rule 52(b) and ordinary prudential doctrines.

The secondary basis of Judge Tjoflat's dissent in *Levy* is that the Eleventh Circuit's reading of Fed. R. Crim. P. 52(b) erroneously renders plain-error review inapplicable to any issue other than those raised in the initial brief. Judge Tjoflat's dissent explains that the court of appeals' unsupported reading - if not outright rejection - of Rule 52(b) is contradicted by this Court's repeated holdings that plain-error review applies even to claims not raised on appeal by any party at any time.[6]

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[6] *See Levy*, 391 F.3d at 1341 n.8 (Tjoflat, J., dissenting from denial of rehearing *en banc*) ("Tellingly, Rule 52(b) refers to errors 'not brought to the court's attention', not errors brought to the *trial* court's attention. This is because the rule was intended to not only to allow appellate courts to correct errors not objected to at trial, but also to allow them to correct errors not raised on appeal. The 1944 advisory committee note thus describes the rule as a 'restatement of existing law' and cites former Supreme Court Rule 27, which 'provide[d] that errors not specified will be disregarded, save as the court, at its option, may notice a plain error not assigned or specified.' The Supreme Court has also noted that Rule 52(b) 'codified' the plain error 'standard laid down in *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392 ... (1936).' *United*

"In exceptional circumstances, **especially in criminal cases**, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings." *United States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392 (1936) (emphasis added). In explaining the meaning of Fed. R. Crim. P. 52(b), this Court in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770 (1993) twice quoted this very sentence in the *Atkinson* decision. *Id.*, 507 U.S. at 732, 736, 113 S.Ct. at 1776, 1779.

In *Olano*, this Court explained that Rule 52(b) should be read consistently with the Court's holding in *Atkinson* that errors not brought to the attention of the appellate court may still be noticed where the error satisfies the plain-error test:

> Rather the standard that should guide the exercise of remedial discretion under Rule 52(b) was articulated in *United States v. Atkinson*, 297 U.S. 157, 56 S.Ct. 391 ... (1936). The Court of Appeals **should** correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Id.*, at 160, 56 S.Ct., at 392. As we explained in *Young*, the "standard laid down in *United States v. Atkinson* [was] codified in

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States v. Young, 470 U.S. 1, 6-7, 105 S. Ct. 1038, 1042 ... (1985). *Atkinson* held that, '[i]n exceptional circumstances, **especially in criminal cases**, appellate courts, in the public interest, may of their own motion, notice errors to which no exception has been taken.' 297 U.S. at 160, 56 S.Ct. at 392. Thus Rule 52(b) does not distinguish between trial-level and appellate-level *forfeitures*; rather the crucial issue is whether the claim was *waived* or only forfeited. *See* [*United States v.*] *Olano*, 507 U.S. [725,] 732-34, 113 S.Ct. [1770,] 1777.") (bold emphasis added) (other emphasis in original).

> Federal Rule of Criminal Procedure 52(b),", 470 U.S., at 7, 105 S.Ct., at 1042, and we repeatedly have quoted the *Atkinson* language in describing plain-error review, *see id.*, at 15, 105 S.Ct.., at 1046, [*United States v.*] *Frady*, 456 U.S. [152,] 163 n.13, 102 S.Ct. [1584,] 1592 n.13 [(1982)]; *Silber v. United States*, 370 U.S. 717, 718, 82 S.Ct. 1287, 1288 ... (1962) (*per curiam*); *Johnson v. United States*, 318 U.S. 189, 200, 63 S.Ct. 549, 554 ... (1943); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 239, 60 S.Ct. 811, 851 ... (1940); *see also Connor v. Finch*, 431 U.S. 407, 471, n.19, 97 S.Ct. 1828, 1837, n.19 ... (1977) (civil appeal).

507 U.S. at 736, 113 S.Ct. at 1779 (emphasis added).

Similarly, in *United States v. Young*, 470 U.S. 1, 105 S. Ct. 1038 (1985), this Court recognized that Rule 52(b) was drafted to prevent manifest injustices even where the party on appeal fails to raise the issue.

> The Advisory Committee's Notes indicate that the Rule restated existing law as set forth by this Court in *Wiborg v. United States*, 163 U.S. 632, 16 S.Ct. 1127 ... (1896): "[A]lthough this question was not properly raised, yet if a plain error was committed in a manner so absolutely vital to defendants, we feel ourselves at liberty to correct it." *Id.*, at 658, 16 S.Ct., at 1137. *See* Advisory Committee's Notes on Fed. Rule Crim. Proc. 52(b), 18 U.S.C.App., p. 657. A review of the drafting that led to the Rule shows that the Committee sought to enable the courts of appeals to review prejudicial errors "so that **any** miscarriage of justice may be thwarted." Advisory Committee on Rules of Criminal Procedure to the Supreme Court of the United States, Federal Rules of Criminal Procedure, Preliminary Draft 263 (1943).

Id, 470 U.S. at 15 n. 12, 105 S.Ct. at 1046 n.12 (emphasis added). *See also United States v. Frady*, 456 U.S. at 163 n.13, 102 S.Ct. at 1592 n.13 (Rule 52(b) "merely restated existing law") (citing Advisory Committee's Notes on Fed. R. Crim. P. 52(b); *Wiborg,* 163 U.S. at 658, 16 S.Ct. at 1137; *Atkinson*, 297 U.S. at 160, 56 S.Ct. at 392 (1936)); *Massaro v. United States*, 538 U.S. 500, 508 (2003) (recognizing appellate court's authority to raise sua sponte issues not briefed by counsel, including issue of counsel's ineffectiveness). The Eleventh Circuit's rule that issues not raised in the initial brief are forever defaulted simply cannot be squared with Rule 52(b) and the antecedent decisions of this Court which inform the Rule's plain meaning.

This Court has already spoken to the applicability of Rule 52(b) to *Booker* errors. In *Booker*, the Court held that "we expect reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." 125 S.Ct. at 769. By setting forth the Court's expectation that only "ordinary prudential doctrines" should be employed, the Court, by implication, was withholding its imprimatur from extraordinary review-denial doctrines and review bars not based on the exercised of prudence and discretion, but rather - as is true of the breadth of application of the Eleventh Circuit's default rule - on the equivalent of an absolute jurisdictional bar to review of a manifest injustice.

The Court's use, in *Booker*, of the term "prudential doctrines" clearly included non-jurisdictional and non-absolute review principles. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22, 119 S.Ct. 1849, 1858 n.22 (1999) (holding that courts are not absolutely bound by the "prudential doctrine" of third-party standing); *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 551, 116 S.Ct. 1529, 1534 (1996) (noting distinction between bars to

review that are "absolute" and bars that are merely "prudential"); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 89, 116 S.Ct. 1114, 1140 (1996) (Stevens, J., dissenting) (distinguishing between bars to review that are merely "prudential" and bars that are jurisdictional and limit the authority of the court). Indeed, the Eleventh Circuit has recognized that it is not "obligated" to apply ordinary "prudential doctrines." *Ungaro-Benages v. Dresdner Bank AG*, 379 F.3d 1227, 1238 (11th Cir. 2004).

The difference between a "prudential doctrine" and an inflexible rule from which a court may not deviate, even to correct a manifest injustice, is real: the latter sort of rule "call[s] into question the Court's power and not merely its prudence." *Honig v. Doe*, 484 U.S. 305, 339, 108 S.Ct. 592, 613 (1988) (Scalia, J., dissenting). The Eleventh Circuit's novel interpretation of the Federal Rules of Appellate Procedure is neither "ordinary," nor one of prudence, but rather a hard-and-fast bar to any sort of appellate review, notwithstanding the level of manifest injustice caused by the violation of fundamental constitutional rights.[7]

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[7] The Eleventh Circuit's application of court-imposed limitations on the exercise of appellate jurisdiction has been addressed by this Court in other contexts. *See, e.g., Ortega-Rodriguez v. United States*, 507 U.S. 234 (1993) (reversing Eleventh Circuit rule of automatic dismissal of appeals under former-fugitive disentitlement doctrine); *United States v. Brown*, 299 F.3d 1252 (11th Cir. 2002) (holding that appellate court lacks jurisdiction to review magistrate ruling where no objection filed in district court), *vacated, Brown v. United States*, 538 U.S. 1010, 123 S.Ct. 1928 (2003) remanding to court of appeals based on concession of error by Solicitor General), *reinstated on remand, United States v. Brown*, 342 F.3d 1245 (11th Cir. 2003) (opinion reinstated in light of pending criminal rule change addressing issue). As is the case here, such absolute bars are not "ordinary prudential doctrines," but bars to the exercise of discretion.

The Court's decision in *Thomas v. Arn*, 474 U.S. 140, 105 S.Ct. 466 (1985), provides a relevant analogy. In *Thomas v. Arn*, the Court held that a court of appeals' adoption of a nonjurisdictional rule, conditioning the right to appeal a district court's adoption of magistrate's recommendation on the filing of objections to the magistrate's report under 28 U.S.C. § 636(b)(1)(B), does not violate constitutional or statutory constraints where the court was free to excuse the error to avoid a manifest injustice. *Id.*, 474 U.S. at 155, 105 S.Ct. at 475. *Thomas v. Arn* expresses the Court's reluctance to afford lower appellate courts unchecked self-regulation of judicially-created issue-preclusion rules. *See id.*, (upholding appellate court's rule for treating a failure to object to a magistrate's report and recommendation as a waiver, but "emphasiz[ing] that, because the rule is a *nonjurisdictional* waiver provision, the Court of Appeals may excuse the default in the interests of justice") (emphasis added); *id.*, 474 U.S. at 155 n.15, 105 S.Ct. at 475 n.15 ("We need not decide at this time what standards the courts of appeals must apply in considering exceptions to their waiver rules."). Here the Eleventh Circuit's rule allows for no exceptions, is non-discretionary and essentially jurisdictional in nature, and is therefore contrary to Fed R. Crim. P. 52(b) and ordinary prudential doctrines.

C. Policy concerns.

Petitioner urges the Court to consider the policy and practical implications of the Eleventh Circuit's judicially-created procedural default rule trumping Fed. R. Crim. P. 52(b) plain-error review. As Judge Tjoflat observed, the ethical and strategic dilemmas facing appellate counsel in light of the Eleventh Circuit rule are imposing. For example, must counsel now recite a laundry list of every issue which may some day become potentially certiorari-worthy in order to provide the bare essential level of effective assistance? *Levy*, 391 F.3d at 1350 (Tjoflat, J., dissenting from denial of hearing en banc).

The paradox of the Eleventh Circuit rule is seen in the review principles of *Anders v. California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400 (1967), and *Ellis v. United States*, 356 U.S. 674, 675, 78 S.Ct. 974, 975 (1958), which provide that when defense counsel finds no non-frivolous issue to raise on appeal, the appellate court must review the entire record of the trial court proceedings to determine whether counsel is correct in finding no review-worthy issue. The irony of the Eleventh Circuit's rule is that a defendant whose counsel failed to find any issue on appeal would receive the benefit of independent court review for plain error in light of the supervening *Booker* decision once counsel's motion to withdraw is filed, but the defendant whose counsel proceeds to raise any other issue on appeal loses the right to plain error review in the Eleventh Circuit. *See, e.g., United States v. Ripoli*, No. 02-4076, 2005 WL 238133, *1-2 (3d Cir. Feb. 2, 2005) (unpub.) (reviewing potential *Booker* issue as part of *Anders* review); *United States v. Fisher*, No. 03-3164, 2005 WL 271541, *1-3 (3d Cir. Feb. 4, 2005) (unpub.)(same).

Likewise, the practical exercise of litigation restraint by appellate counsel and the interest that the courts of appeals remain open to those who have suffered violations of fundamental constitutional rights counsel against allowing the erosion of Rule 52(b) and *Griffith v. Kentucky* which the Eleventh Circuit, and no other circuit, has set in motion with its preclusive procedural default rule. *See Levy*, 391 F.3d at 1350 (Tjoflat, J., dissenting from denial of rehearing *en banc*)("[T]he rule will do great harm to the fair and efficient administration of justice in this circuit.") For these reasons, and to resolve the clear circuit conflict, petitioner asks that the Court grant certiorari.[8]

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[8] The Government may argue that certiorari should not be granted because any error by the Eleventh Circuit cannot constitute plain error because Tugman cannot know how the district court

II. The court of appeals erred in failing to apply the "reasonableness" standard of review mandated for all federal sentencing appeals by this Court's decision in *Booker*.

The court of appeals, in reviewing the district court's sentencing decision, applied clear error review, *see United States v. Boyd*, 291 F.3d 1274, 1277 (11th Cir. 2002), limiting its review of the district court's ultimate sentencing decision to a determination of whether there was some evidence in the record to support the district court's factual finding as to the defendant's role in the offense and application of the obstruction of justice enhancement. In so doing, the court of appeals failed to undertake the independent "reasonableness" review mandated by this Court's decision in *Booker*. 125 S.Ct. at 763, 769; *see e.g., United States v. Yahnke*, No. 04-1098,

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would have sentenced him under advisory, rather than mandatory, Sentencing Guidelines. *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir. 2005) (holding that *Booker* error was not plain error where the defendant could not show a reasonable probability that he would receive a lower advisory Guidelines sentence). The first response to this argument is that it is premature because the Eleventh Circuit has not even allowed Tugman to raise his *Booker* claim. The second response is that the Eleventh Circuit's plain error analysis is wrong, and the contrary analyses adopted by the Second, Fourth, Sixth and Seventh Circuits are correct. *United States v. Crosby*, 397 F.3d 103 (2nd Cir. 2005); *United States v. Hughes*, – F.3d –, 2005 WL 628224 (4th Cir. 2005); *United States v. Oliver*, 397 F.3d 369 (6th Cir. 2005); *United States v. Paladino*, 401 F.3d 471, 484 (7th Cir. 2005) (Posner, J.) (criticizing the Eleventh Circuit's *Rodriguez* opinion; "Given the alternative of simply asking the district judge to tell us whether he would have given a different sentence, and thus dispelling the epistemic fog, we cannot fathom why the Eleventh Circuit wants to condemn some unknown fraction of criminal defendants to serve an illegal sentence").

2005 WL 221451, *1 (8th Cir. Feb. 1, 2005) ("The Supreme Court in *Booker* excises section 3742(e) and any de novo review of sentences. *See Booker*, 125 S.Ct. 738. This court now reviews sentences for 'unreasonable[ness].' *Id.* at 763."); *United States v. Tanner*, No. 02-10661, 2005 WL 147590, *2 (9th Cir. Jan. 25, 2005) (unpub.) (applying "reasonableness" standard to guidelines appeal in light of *Booker*).

Given the court of appeals erroneous application of what is now a statutorily inapplicable standard of review, the court of appeals failed to determine whether petitioner's sentence is reasonable in light of all of the relevant statutory factors under 18 U.S.C. § 3553(a). For that reason, even if the Court fails to grant merits review of the significant issue-preclusion rule raised in question one of this petition, the case should nevertheless be remanded to the Eleventh Circuit for reconsideration in light of *Booker*.

Even under the Eleventh Circuit's issue-preclusion procedural default rule addressed in question one, changes in the governing principles of review cannot be ignored by the court of appeals. Since the elimination of 18 U.S.C. § 3742(e) in *Booker* is retroactively applicable to cases on direct review, *see* 125 S.Ct. at 769, a remand to the Eleventh Circuit is required to permit the court of appeals to apply the reasonableness review standard to issues raised in the initial brief.

III. The court of appeals erred by either refusing to apply Federal Rule of Evidence 408 in this criminal case or by erroneously finding that the extensive testimony introduced by and argument made by the prosecution about statements Tugman made during civil settlement negotiations in violation of Rule 408 did not constitute plain error.

The prosecution introduced testimony from three witnesses that at a meeting with Patrick Neal, his wife's employer, and Neal's attorney, Chuck Johnson, Tugman said he would give up more assets than Neal was seeking to recover in a related civil suit if Neal "wouldn't pursue criminal proceedings." App. 47. This testimony was introduced without objection on both the first day and last day of trial testimony (App. 39-47 and App. 48-52), despite the fact that Federal Rule of Evidence 408 provides that "[e]vidence of conduct or statements made in compromise negotiations is likewise not admissible."

The testimony of Chuck Johnson demonstrates that this meeting was in fact exactly the type of "compromise negotiations" governed by Rule 408. Tugman met with Neal and Johnson immediately after being served with the civil complaint and offered to turn over more assets than Neal had sued for in the hope that, as Johnson testified, "everything should go away." (App. 49-51) Clearly, Tugman was attempting to negotiate a settlement to the civil suit against himself and his wife. As Neal testified, Tugman and his wife "wanted to sue for peace". (App. 45) Tugman's statements at this meeting therefore were not admissible under Rule 408.

The repeated admission of statements Tugman made during the civil settlement negotiation regarding his hope that criminal proceedings could be avoided constitutes plain error because the jury must have concluded that only a person who believed himself to be guilty would be seeking to avoid criminal prosecution as part of a civil settlement. *United States v. Hayes*, 872 F.2d 582, 589 (5th Cir. 1989) ("It does not tax the imagination to envision the juror who retires to deliberate with the notion that if the defendants had done nothing wrong, they would not have paid the money back"). Indeed, in its rebuttal closing, the prosecution argued repeatedly that Tugman's statements during this civil settlement negotiation seeking to

avoid criminal prosecution "shows evidence of consciousness of guilt." (App. 53-55) But that is precisely the inference that Rule 408 precludes.

Since Tugman's statements clearly should not have been admitted under Rule 408, the Eleventh Circuit's decision to affirm his convictions without explanation must have been based either on its conclusion that Rule 408 does not apply in criminal cases or that this error did not constitute plain error. Either of these conclusions is wrong and demonstrates an obvious circuit split which this Court now should resolve.

Three circuits have held incorrectly that Rule 408 does not apply to criminal cases. *United States v. Logan,* 250 F.3d 350, 367 (6th Cir. 2001); *Manko v. United States,* 87 F.3d 50, 54-55 (2nd Cir. 1996); *United States v. Prewitt,* 34 F.3d 436, 439 (7th Cir. 1994). Two circuits have held correctly that Rule 408 does apply to criminal cases. *United States v. Bailey,* 327 F.3d 1131, 1144 (10th Cir. 2003); *United States v. Hays,* 872 F.2d 582, 588 (5th Cir. 1989). Two other circuits have suggested in dicta that Rule 408 may apply in criminal proceedings. *See United States v. Graham,* 91 F.3d 213, 218 (D.C. Cir. 1996); *United States v. Reed,* 714 F.2d 7, 9-10 (4th Cir. 1983). The Ninth and Eleventh Circuits have not decided this question. *United States v. Jacobs,* 156 F.3d 1240 (table), 1998 WL 482934, **1 (9th Cir. 1998) (unpub.)("We need not decide whether Rule 408 applies in criminal cases because we conclude that the statements do not in any event fall within the scope of the rule"); *United States v. Technic Services, Inc.,* 314 F.3d 1031, 1045 (9th Cir. 2002)(applying Rule 408 to admission of documents submitted to Environmental Protection Agency under Rule 408, but deciding they were properly offered to prove obstruction of an EPA investigation); *United States v. Pendergraft,* 297 F.3d 1198, 1211 n.8 (11th Cir. 2002) (holding that evidence of settlement negotiations offered to show defendants' cooperation was not barred by Rule 408, but not

discussing whether or not Rule 408 applies to criminal cases); *United States v. Meadows,* 598 F.2d 984, 989 (5th Cir. 1979) (assuming, but not deciding, that Rule 408 applies to criminal cases).

The Court should now resolve this circuit split which has developed over more than twenty years by granting certiorari and ruling that Rule 408 applies to criminal cases as well as civil cases for numerous reasons. First, "nothing in Rule 408 explicitly states that it is inapplicable to criminal proceedings." *Bailey*, 327 F.3d at 1146. Second, Fed. R. Evid. 1101(b) provides that the Federal Rules of Evidence "apply generally ... to criminal cases ...." just as much as to civil cases. Third, the policy behind Rule 408, that evidence of settlement negotiations are irrelevant "since the offer may be motivated by a desire for peace rather than from any concession of weakness of position", applies equally to criminal and civil cases. Rule 408 Advisory Committee Notes (1972 proposed rules).

Fourth, "the potential prejudicial effect of the admission of evidence of a settlement [or an offer to settle] can be more devastating to a criminal defendant than to a civil litigant." *Bailey*, 327 F.3d at 1146; *State v. Gano*, 988 P.2d 1153, 1159 (Hawaii 1999) (holding that Rule 408 applies in criminal proceedings in part because "the potential impact of evidence regarding a civil settlement agreement is even more profound in criminal proceedings than it is in civil proceedings"). Fifth, the last sentence of Rule 408 states that it "does not require exclusion when the evidence is offered for another purpose, such as ... proving an effort to obstruct a criminal investigation or prosecution." But "[i]f Rule 408 did not apply in criminal cases, there would be no need to carve out an exception for certain circumstances in criminal cases." *United States v. Skeddle*, 176 F.R.D. 254, 257 (N.D. Ohio 1997). As the Tenth Circuit noted, "the final sentence [of Rule 408] is arguably unnecessary if the Rule does not apply to criminal proceedings

at all." *Bailey*, 327 F.3d at 1146. Sixth, prominent evidence commentators agree with the Fifth and Tenth Circuit's position that Rule 408 should apply in both civil and criminal proceedings. 2 Jack B. Weinstein and Margaret A. Berger, *Weinstein's Federal Evidence*, § 468.08[6] (2d ed. 1997); 23 Charles Alan Wright and Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5308 (Supp. 2002).

Alternatively, the Eleventh Circuit may have decided wrongly that the repeated testimony and prosecutorial argument regarding Tugman's statements during the civil settlement negotiation did not constitute plain error. Such a conclusion would be clearly erroneous because the prosecution emphasized that Tugman's statements constituted direct evidence of his consciousness of guilt.[9] As the Fifth Circuit has recognized, "the potential impact of evidence regarding a settlement agreement with regard to a determination of liability is profound." *Hays,* 872 F.2d at 589. Because the jury must have concluded that only a person who believed himself to be guilty would be seeking to avoid criminal prosecution as part of a civil settlement, the erroneous admission of multiple statements by Tugman in violation of Rule 408 by multiple witnesses on the first and last day of trial testimony, followed by the emphasizing of these statements in the prosecution's rebuttal closing argument,[10] created unavoidable plain error

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[9] Such direct evidence of Tugman's criminal intent was critically important to the prosecution because the prosecution could not prove that Tugman altered, negotiated or deposited any of the checks embezzled by Searcy.

[10] The prosecution used the principles of primacy, by introducing this evidence on the first day of trial testimony and recency, by introducing this evidence on the last day of trial testimony and also by arguing the importance of this evidence in proving the critical disputed issue of intent during its rebuttal

warranting a new trial on all counts, just as was ordered by the Fifth Circuit in *Hays* despite the absence of an objection at trial.

CONCLUSION

Based upon the foregoing petition, the Court should grant a writ of certiorari to the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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Attorneys for Petitioner, Mark R. Tugman

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closing, when Tugman could not respond and shortly before the jury began deliberating.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16404

D.C. Docket No. 02-00452 CR-T-20-MSS

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK R. TUGMAN,

Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida

(JANUARY 14, 2005)

Before DUBINA and FAY, Circuit Judges, and GOLDBERG*, Judge.

PER CURIAM:

---

* Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

Appellant Mark R. Tugman appeals his convictions and sentences for various securities and money laundering offenses. He also appeals the district court's forfeiture order.

The following issues are presented for appellate review:

(1) Whether there was sufficient evidence to support Tugman's convictions for possession of forged securities, money laundering, and two of the objects of the Count One conspiracy.

(2) Whether the district court abused its discretion by admitting into evidence a statement by Tugman's mother-in-law that Tugman had blackmailed his wife into continuing her embezzlement scheme.

(3) Whether the district court committed plain error by allowing into evidence a statement attacking Tugman's character and allowing statements regarding civil settlement negotiations.

(4) Whether the district court erred by instructing the jury on constructive possession.

(5) Whether the district court erred by attributing the entire loss of $1.9 million to Tugman; by finding that Tugman was not a minor or minimal participant; and by finding that the evidence supported an enhancement for obstruction of justice.

(6) Whether the district court erred in issuing its order of forfeiture.

After reviewing the record, reading the parties' briefs and having the benefit of oral argument, we see no merit to any of the arguments Tugman makes in this appeal and affirm his convictions and sentences. We also affirm the district court's

forfeiture order.

AFFIRMED.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JANUARY 14, 2005
THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee, v. MARK R. TUGMAN,

Appellant.

Case No. 03-16404-FF
District Court Case No.: 8:02-CR-452-T-30MAP

_____/

DEFENDANT'S SECOND RENEWED MOTION FOR BOND PENDING APPEAL

Defendant Mark R. Tugman files this Second Renewed Motion for Bond Pending Appeal and states as follows in support thereof:

1. On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington*, 2004 WL 1402697, in which it held that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id. at *9.

2. Defendant Tugman was sentenced after trial pursuant to U.S.S.G. §2F1.1, which has a base offense level of 6 (0-6 months imprisonment). None of the enhancements which increased Mr. Tugman's sentence (loss amount; more than minimal planning; and obstruction of justice) were proven to a jury, as required by *Blakely* and the Sixth Amendment to the United States Constitution.

3. Accordingly, Defendant Tugman should be resentenced to no more than the six months imprisonment

which is the upper limit of the §2F1.1 base offense level. *United States v. Booker*, 2004 WL 1535858 (7th Cir., July 9, 2004); United *States v. Montgomery*, 2004 WL 1535646 (D. Utah) (July 8, 2004); *United States v. Shamblin*, 2004 WL 1468561 (S.D.W. Va.) (June 30, 2004).

4. Mr. Tugman will have completed serving six months imprisonment on July 26, 2004.

5. Even though Mr. Tugman was convicted of two money laundering counts, he would not be resentenced under the §2S1.2 money laundering guideline, which has a higher base offense level than §2F1.1, because those convictions are due to be reversed for the reasons stated in Mr. Tugman's initial and reply briefs.

6. Therefore, Mr. Tugman should be released on bond pending appeal immediately after July 26, 2004 when he has completed six months of imprisonment.

WHEREFORE, defendant Mark R. Tugman requests that this Court grant this Second Renewed Motion for Bond Pending Appeal.

Respectfully submitted,
s/
Todd Foster, Esq.
Florida Bar # 0325198
Kevin Darken, Esq.
Florida Bar # 0090956
Cohen, Jayson & Foster, P.A.
201 E. Kennedy Boulevard
Suite 1000
Tampa, FL 33602
Attorneys for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Assistant United States Attorney David Rhodes, 400 N. Tampa St., Suite 3200, Tampa, FL 33602, this 13th day of July, 2004.

s/_____

Attorney

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
JULY 14, 2004
THOMAS K. KAHN
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

APPEAL NO. 03-16404-FF

v.

MARK R. TUGMAN,
Defendant-Appellant.

UNITED STATES' RESPONSE IN OPPOSITION TO "DEFENDANT'S SECOND RENEWED MOTION FOR BOND PENDING APPEAL"

The United States opposes on the following grounds defendant-appellant Mark Tugman's second renewed motion for bond pending appeal:

Tugman has been convicted of multiple counts of making, uttering, and possessing forged securities; multiple counts of making false statements in bank loan applications; multiple counts of money laundering; and one count of conspiring to commit those offenses. Doc. 163. The district court sentenced Tugman to serve forty-one months in prison on each count, to be served concurrently. Docs. 162, 163.

Tugman moved in the district court for release on bond pending appeal, Doc. 147, but the district court denied the motion, Doc. 173 at 2-3. Thereafter, this Court denied Tugman's motion for release pending appeal, Jan. 20, 2004, Order, and his renewed motion for bond pending appeal, April 26, 2004, Order.

Tugman now has sought, once again, to avoid serving

his prison sentence pending this appeal. (Additionally, the district court recently denied an identical "second renewed motion" that Tugman filed in the district court.) For the reasons stated in the United States' previously-filed responses to Tugman's original motion and renewed motion, as well as the additional reasons set forth below, this Court should deny Tugman's second renewed motion for bond pending appeal.

MEMORANDUM OF LAW

In his newest motion, Tugman argues that Blakely v. Washington, 124 S.Ct. 2531 (2004), requires him to be resentenced to no more than six months' imprisonment on his fraud convictions. In Blakely, the Supreme Court held that a Washington state sentencing scheme deprived the defendant of his constitutional right to have a jury determine beyond a reasonable doubt all facts legally essential to his sentence. (Tugman also has filed with this Court a notice of supplemental authority citing to Blakely.) This Court should deny Tugman's newest motion for release.

First, for the reasons stated in the United States' responses to Tugman's previous motions for release pending appeal, Tugman has not demonstrated, by clear and convincing proof or otherwise, that he poses no danger to the community.

Second, for the reasons stated in the United States' previous responses, Tugman has not demonstrated, by clear and convincing proof or otherwise, that he is not a flight risk.

Third, for the reasons previously stated both in the United States' responses and in its brief, Tugman has not shown that his appeal raises a substantial question of law or fact that, if resolved in his favor, would likely result in a term of imprisonment of less than the total of the time already served plus the expected duration of the appeal process. Setting aside

momentarily the sentences on the fraud convictions that Tugman now claims are vulnerable under Blakely, Tugman stands convicted and sentenced on several other counts to which he has not even suggested that Blakely applies. As to those convictions, Tugman merely states that "those convictions are due to be reversed for the reasons stated in [his] initial and reply briefs." For the reasons stated in the United States' brief, however, there is no reversible error as to those counts of conviction, so Tugman's sentence will not be reduced even if he were entitled to relief on his fraud sentences.

Fourth, even if Tugman had overcome all of these impediments to release, Blakely still would not entitle him to release pending the outcome of this appeal. For one thing, Blakely is not an issue in this appeal because Tugman has not challenged in his briefs on appeal the constitutionality of the sentencing guidelines or the district court's authority to impose a prison sentence based on judge-made fact-findings by a preponderance of the evidence. (Tugman has filed a purported notice of supplemental authority based on Blakely.) Because Blakely does not relate to any issue that Tugman has raised in his initial or reply briefs, Tugman may not even raise Blakely at this juncture. Therefore, Blakely cannot provide a basis for reversal of Tugman's fraud convictions. See United States v. Blasco, 702 F.2d 1315, 1332 n.28 (11th Cir. 1983) (refusing to consider issue first raised via notice of supplemental authority); see also United States v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (declining to allow supplemental briefing on new issues, "even if the [new] issues arise based on the intervening decisions or new developments cited in the supplemental authority"); United States v. Padilla-Reyes, 247, 1158, 1164 (11th Cir. 2001). Therefore, Blakely cannot provide a basis to release Tugman pending appeal, even if Tugman had met the other requirements of section 3143(b), which he has not.

For another thing, the district court did not commit

plain error warranting reversal in applying the sentencing guidelines at Tugman's sentencing. It is by no means plain that Blakely invalidates the federal sentencing guidelines. See, e.g., United States v. Pineiro, No. 03-30437, 2004 WL 1543170 (5th Cir. July 12, 2004) (holding that Blakely does not extend to the federal sentencing guidelines). Given the state of the law, Tugman has not shown that his appeal raises a substantial question of law or fact that, if resolved in his favor, would likely result in a term of imprisonment of less than the expected duration of the appeal process.

For all of these reasons, this Court should deny Tugman's second renewed motion for release on bond pending appeal.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney

TAMRA PHIPPS
Assistant United States Attorney
Chief, Appellate Division

By: s/
DAVID P. RHODES
Assistant United States Attorney
Appellate Division
Florida Bar No. 0438741
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Telephone: (813) 274-6305
Facsimile: (813) 274-6102

DATE: July 22, 2004

United States v. Tugman
Appeal No. 03-16404-FF

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Kevin Darken, co-counsel for defendant-appellant;

2. Rachelle DesVaux-Bedke, Assistant United States Attorney, district court co-counsel for the United States:

3. Adelaide Few, Assistant United States Attorney, district court co-counsel for the United States;

4. John Fitzgibbons, district court counsel for defendant-appellant;

5. Todd Foster, co-counsel for defendant-appellant;

6. The Honorable James S. Moody, Jr., United States District Judge;

7. Patrick K. Neal & Associates, victim;

8. Paul I. Perez, United States Attorney;

9. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

United States v. Tugman
Appeal No. 03-16404-FF

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CONT'D)

9. David P. Rhodes, Assistant United States Attorney, appellate counsel for the United States; and

10. Mark Tugman, defendant-appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent on this the 22nd day of July, 2004, via the United States Postal Service, to the following:

Todd Foster, Esquire
Kevin Darken, Esquire
Cohen, Jayson & Foster, P.A.
201 E. Kennedy Boulevard, Suite 1000
Tampa, Florida 33602

/s/
DAVID P. RHODES
Assistant United States Attorney

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-16404-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK R. TUGMAN,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

O R D E R:

Appellant's second renewed motion for release pending appeal made pursuant to Blakely v. Washington, ___ U.S. __, 125 S.Ct. 2531 (2004) is DENIED. Appellant has raised no Blakely-type issues in his initial brief, and this Court will not consider any issues raised outside the initial brief. See U.S. v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001); U.S. v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001); U.S. v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000).

/s/
UNITED STATES CIRCUIT JUDGE

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 4, 2004
THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

v.

MARK R. TUGMAN,

Appellant.

Case No. 03-16404-FF
District Court Case No.:
8:02-CR-452-T-30MAP

/

DEFENDANT'S MOTION TO STRIKE BRIEFS AND ORDER RE-BRIEFING OF *BLAKELY* ARGUMENT OR IN THE ALTERNATIVE TO REMAND FOR RESENTENCING

Defendant Mark Tugman, by and through undersigned counsel, moves this Court to strike the briefs filed in this appeal and order re-briefing to permit Mr. Tugman to challenge pursuant to *Blakely v. Washington,* 124 S.Ct. 2531 (2004) enhancements for loss, more than minimal planning and obstruction of justice applied by the district court following his conviction at trial. In support thereof, the Defendant states as follows:

1. On June 24, 2004, the United States Supreme Court issued its opinion in *Blakely v. Washington*, 2004 WL 1402697, in which it held that "every defendant has the right to insist that the prosecutor prove to a jury all facts legally essential to the punishment." Id. at *9.

2. Defendant Tugman was sentenced after trial pursuant to U.S.S.G. §2F1.1, which has a base offense level of

6 (0-6 months imprisonment). None of the enhancements which increased Mr. Tugman's sentence (loss amount; more than minimal planning; and obstruction of justice) were proven to a jury, as required by *Blakely* and the Sixth Amendment to the United States Constitution.

3. Accordingly, Defendant Tugman should be re-sentenced to no more than the six months imprisonment which is the upper limit of the §2F1.1 base offense level. *United States v. Booker*, 2004 WL 1535858 (7th Cir., July 9, 2004); *United States v. Montgomery*, 2004 WL 1535646 (D. Utah) (July 8, 2004); *United States v. Shamblin*, 2004 WL 1468561 (S.D.W. Va.) (June 30, 2004).

4. This Court has the authority to order the original briefs struck and to order rebriefing. *Clark v. Crosby*, 335 F.3d 1303, 1306 (11th Cir. 2003) (noting that appellate counsel could have moved to re-brief to raise a Florida Supreme Court decision issued while defendant's appeal was still under consideration); *Exxon Corp. v. Busbee*, 644 F.2d 1030, 1031 (5th Cir. Unit B 1981) (noting that this Court had ordered rebriefing), *cert denied*, 124 S.Ct. 1159 (2004); *Passmore v. Estelle*, 607 F.2d 662, 664 (5th Cir. 1979) ("In the instant case, the Texas Court of Criminal Appeals could have ordered petitioner's counsel to rebrief the case before disposition of the appeal ....").

5. In fact, this Court on its own motion struck the briefs in order to permit rebriefing of *Blakely* issues in *United States v. Richard O. Singer*, No. 03-15801-FF (July 30, 2004). *See* Order of Circuit Judge Charles Wilson attached as Exhibit 1.

6. In denying Mr. Tugman's Second Renewed Motion for Bond Pending Appeal, this Court ruled that it would not consider issues not raised in a defendant's initial brief.

However, that principle does not prohibit this Court from ordering rebriefing in order to permit an intervening United States Supreme Court decision from being raised while a defendant's appeal is still under consideration. *Clark v. Crosby*, 335 F.3d at 1306.

7. In an analogous situation, this Court sitting *en banc* permitted a second petition for habeas relief in *Moore v. Kemp*, 824 F.2d 847, 851 (11th Cir. 1987) despite the fact that the defendant did not raise that argument in his first § 2254 petition because counsel's failure to anticipate the Supreme Court's application of *Miranda* to the sentencing phase of capital proceedings was reasonable under the circumstances. Likewise, in this case counsel's failure to anticipate the Supreme Court's application of Sixth Amendment principles to sentence enhancements was reasonable under the circumstances. Therefore, Defendant Tugman should be permitted to raise his Sixth Amendment *Blakely* issues just as the defendant in *Moore* was permitted to raise his Fifth Amendment right to remain silent and Sixth Amendment right to counsel issues despite not having raised them in his initial petition.

8. It would be unfair and a violation of the Equal Protection Clause of the Fourteenth Amendment for this Court to permit rebri ing of *Blakely* issues in the *Singer* case, yet to deny the same opportunity to Mr. Tugman.

9. In the alternative, this Court should remand this case for resentencing by the district court. Such a remand would permit this Court to evaluate *Blakely* issues on a complete record.

WHEREFORE, Defendant Mark R. Tugman requests that this Court strike the briefs filed in this appeal and order re-briefing to permit Defendant to challenge his sentencing

enhancements based on *Blakely v. Washington*, or in the alternative remand this case to the district court for resentencing.

Respectfully submitted,

s/_____

Todd Foster, Esq.
Florida Bar # 0325198
Kevin Darken, Esq.
Florida Bar # 0090956
Cohen, Jayson & Foster, P.A.
201 E. Kennedy Boulevard
Suite 1000
Tampa, FL 33602
Attorneys for the Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Assistant United States Attorney David Rhodes, 400 N. Tampa St., Suite 3200, Tampa, FL 33602, this 10th day of August, 2004.

s/_____

Attorney

U.S. COURT OF APPEALS
RECEIVED
CLERK
AUGUST 11, 2004
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-15801-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

RICHARD O. SINGER,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

ORDER:

Appellant's motion to file a supplemental brief in order to raise issues pursuant to Blakely v. Washington __ U.S. __, 124 S.Ct. 2531 (2004) is DENIED. See U.S. v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001); U.S. v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001); U.S. v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000).

On its own motion, the Court STRIKES the briefs filed by the parties and orders that this appeal be re-briefed so that Appellant may raise Blakely issues in this appeal.

Appellant's substitute initial brief will be due within

EXHIBIT
1

(14) days of the date of this Order. Appellee's substitute response brief will be due within fourteen (14) days of the date of service of Appellant's brief. Appellant's reply brief, if any, will be due within seven (7) days of service of Appellee's brief.

s/
CHARLES WILSON
UNITED STATES CIRCUIT JUDGE

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
AUGUST 4, 2004
THOMAS K. KAHN
CLERK

EXHIBIT
1

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

APPEAL NO. 03-16404-FF

v.

MARK R. TUGMAN,
Defendant-Appellant.

UNITED STATES' RESPONSE IN OPPOSITION TO "DEFENDANT'S MOTION TO STRIKE BRIEFS AND ORDER RE-BRIEFING OF BLAKELY ARGUMENT OR IN THE ALTERNATIVE TO REMAND FOR RESENTENCING"

The United States opposes on the following grounds defendant-appellant Mark Tugman's "motion to strike briefs and order re-briefing of Blakely argument or in the alternative to remand for resentencing":

Tugman has been convicted of multiple counts of making, uttering, and possessing forged securities; multiple counts of making false statements in bank loan applications; multiple counts of money laundering; and one count of conspiring to commit those offenses. Doc. 163. The district court sentenced Tugman to serve forty-one months in prison on each count, to be served concurrently. Docs. 162, 163. Tugman brought this appeal, in which he has raised twelve issues. The parties have fully briefed this appeal.

This Court recently denied Tugman's "second renewed motion for bond pending appeal," in which Tugman asked this Court to release him on the ground that Blakely v. Washington,

124 S.Ct. 2531 (2004). compels a substantial reduction in his sentence. In denying the motion, this Court ruled that "Appellant has raised no Blakely-type issues in his initial brief, and this Court will not consider any issues raised outside the initial brief. See U.S. v. Ford, 270 F.3d 1346, 1347 (11th Cir. 2001); U.S. v. Ardley, 242 F.3d 989, 990 (11th Cir. 2001); U.S. v. Nealy, 232 F.3d 825, 830 (11th Cir. 2000)." Aug. 4, 2004, Order.

Now, Tugman has asked this Court to strike the parties' briefs and order new briefing to allow him to raise a Blakely argument. He alternatively asks this Court to remand this case for resentencing. This Court should deny Tugman's motion.

First, for this Court to simply strike the briefs already filed so that Tugman could raise a new issue through new briefing would enable him to circumvent Fed. R. App. P. 28(a)(5), which requires that an appellant's initial brief contain "a statement of the issues presented for review." See United States v. Levy, No. 01-17133, 2004 WL 1725406 (11th Cir. Aug. 3, 2004). In Levy, this Court denied Levy's request to raise a Blakely issue for the first time in a petition for rehearing. This Court explained that "the rule requiring that issues be raised in opening briefs serves valuable purposes, as do all of the procedural default rules, which is why we regularly apply them." Levy, 2004 WL 1725406 (quotation marks omitted).

Even more recently, this Court rejected another appellant's attempt to file a supplemental brief raising a Blakely issue. See United States v. Curtis, No. 02-16224, 2004 WL 1774785 (11th Cir. Aug. 10, 2004) ("Levy and the cases relied upon therein based their decisions upon the equally long-standing rule in this circuit, as well as in the federal rules themselves, that issues not raised by a defendant in his initial brief on appeal are deemed waived."); see also United States v.

Nealy, 232 F.3d 825, 830 (11th Cir. 2000) (Apprendi issue could not be raised for first time in supplemental brief). Moreover, in Curtis, this Court "discern[ed] no miscarriage of justice that would result on account of Curtis' inability to raise his proposed Blakely issue." Curtis, 2004 WL 1774785. Tugman, likewise, should not be permitted to circumvent these longstanding principles by starting the already-completed briefing anew.

In his motion seeking to strike the parties' briefs, Tugman cites an unpublished order in United States v. Singer, Appeal No. 03-15801-FF. That order relied on this Court's precedent and denied the appellant's motion for supplemental briefing, but the order also sua sponte struck the parties' briefs and ordered the appeal "re-briefed so that Appellant may raise Blakely issues in this appeal." See Tugman's motion at exh. 1. By allowing the appellant to resurrect a waived Blakely issue, however, the Singer order conflicts with both Levy and Curtis and "circumvents [Rule] 28(a)(5), which requires that an appellant's initial brief must contain 'a statement of the issues presented for review.'" Levy, 2004 WL 1725406. Indeed, the United States has moved for reconsideration of the Singer order in light of Levy, Curtis, and other authorities. In any event, this Court's published decisions--not the Singer order--govern the issue, and those decisions call for the denial of Tugman's motion. See United States v. Mejia, 154 F.3d 1297, 1297 n.1 (11th Cir. 1998) ("Unpublished opinions of this court are non-binding precedent and may be overruled by a published panel opinion.").

Finally, Tugman asks this Court, in the alternative, "to remand this case for resentencing by the district court." Tugman's motion at 3. Suffice it to say that an appellant is entitled to a remand for resentencing if he convinces the court of appeals that the district court committed reversible error that warrants a remand for resentencing. See generally 18 U.S.C.

§ 3742(f). As this Court already has concluded, however, Tugman has not even asserted a Blakely issue on appeal. August 4, 2004, Order. He certainly has not demonstrated that a Blakely error occurred and that the error warrants reversal and a remand for resentencing. See Curtis, 2004 WL 1774785 at n.2 (noting that appellant had failed to raise Blakely issue and, in any event, had not satisfied plain-error criteria for reversal).

For these reasons, this Court should deny Tugman's motion seeking to have the parties' briefs struck and re-briefing ordered.

Respectfully submitted,

PAUL I. PEREZ
United States Attorney
TAMRA PHIPPS
Assistant United States Attorney
Chief, Appellate Division

By: /s/
DAVID P. RHODES
Assistant United States Attorney
Appellate Division
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Telephone: (813) 274-6305
Facsimile: (813) 274-6102

DATE: August 12, 2004

United States v. Tugman

Appeal No. 03-16404-FF

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1 and 11th Cir. R. 26.1-1, the undersigned hereby certifies that the following persons and entities have an interest in the outcome of this case:

1. Kevin Darken, co-counsel for defendant-appellant;

2. Rachelle DesVaux-Bedke, Assistant United States Attorney, district court co-counsel for the United States:

3. Adelaide Few, Assistant United States Attorney, district court co-counsel for the United States;

4. John Fitzgibbons, district court counsel for defendant-appellant;

5. Todd Foster, co-counsel for defendant-appellant;

6. The Honorable James S. Moody, Jr., United States District Judge;

7. Patrick K. Neal & Associates, victim;

8. Paul I. Perez, United States Attorney;

9. Tamra Phipps, Assistant United States Attorney, Chief, Appellate Division;

United States v. Tugman
Appeal No. 03-16404-FF

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CONT'D)

9. David P. Rhodes, Assistant United States Attorney, appellate counsel for the United States; and

10. Mark Tugman, defendant-appellant.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent on this the 12th day of August, 2004, via the United States Postal Service, to the following:

Todd Foster, Esquire
Kevin Darken, Esquire
Cohen, Jayson & Foster, P.A.
201 E. Kennedy Boulevard, Suite 1000
Tampa, Florida 33602

/s/
DAVID P. RHODES
Assistant United States Attorney

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee, Case No. 03-16404-FF
v. District Court Case No.: 8:02-CR-452-T-30MAP

MARK R. TUGMAN,

Appellant.
_____/

DEFENDANT'S REPLY TO UNITED STATES' RESPONSE IN OPPOSITION TO DEFENDANT'S MOTION TO STRIKE BRIEFS AND ORDER RE-BRIEFING OF *BLAKELY* ARGUMENT OR IN THE ALTERNATIVE TO REMAND FOR RESENTENCING

Defendant Mark R. Tugman, by and through his undersigned counsel, replies pursuant to FRAP 27(a)(4) to the United States' Response in Opposition to Defendant's Motion to Strike Briefs and Order Re-Briefing of *Blakely* Argument or in the Alternative to Remand for Resentencing as follows:

1. The Government's reliance on *United States v. Levy*, 2004 WL 1725406 (11th Cir., August 3, 2004) is misplaced. Levy sought to raise a *Blakely* issue in a petition for rehearing after this Court had decided his appeal. Mr. Tugman is seeking to raise a *Blakely* issue prior to his appeal being decided and indeed prior to any oral argument being scheduled.

2. The Government's reliance on *United States v. Curtis*, 2004 WL 1774785 (11th Cir., August 10, 2004)

similarly is misplaced. Curtis sought leave to file a supplemental brief raising a *Blakely* issue after oral argument had been heard and while his case was being decided. Had Curtis' motion been granted, the time table for resolution of his appeal inevitably would have been delayed. In this case, however, a fast rebriefing schedule would permit Mr. Tugman to raise his *Blakely* issues without delaying the ultimate resolution of his appeal.

3. This case is in the same procedural posture as *United States v. Singer*, Appeal No. 03-15801-FF. Consequently, Mr. Tugman deserves to receive the same rebriefing opportunity this Court provided to the defendant in *Singer*.

4. The Government's claim that "the *Singer* order conflicts with both *Levy* and *Curtis*", United States' Response at 4, is incorrect. The *Singer* order simply permits rebriefing at a point in the appellate process in which rebriefing could occur without the resolution of that appeal being delayed. Rebriefing would not be permitted under *Singer* in the *Levy* case because that appeal had already been decided or in the *Curtis* case because oral argument had already taken place. But simply because rebriefing was inappropriate in those cases does not mean that it would be inappropriate at an earlier stage of appellate proceedings, such as in both *Singer* and in this case.

5. While it is true that no *Blakely* objections to the sentencing enhancements in this case were made in Defendant Tugman's briefs, it is also true (1) that objections to all sentencing enhancements were made in the initial brief, and (2) that a specific objection was made to the fact that no forfeiture verdict was obtained from the jury at the close of the trial. Consequently, the fact that the factual findings underlying the

forfeiture order were made by the district court rather than by the trial jury was raised in Defendant Tugman's briefs.

6. This Court should reconsider its position in *Curtis* that sentencing enhancements applied by the district court rather than by a jury cannot amount to plain error in light of the recent decision by the Eighth Circuit in *United States v. Pirani*, 2004 WL 1748930, (8th Cir. August 5, 2004).

Respectfully submitted,

s/

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I HEREBY CERTIFY that a true and correct copy of the foregoing was delivered by hand to Assistant United States Attorney David Rhodes, 400 N. Tampa St., Suite 3200, Tampa, FL 33602, this 20TH day of August, 2004.

s/

Attorney

U.S. COURT OF APPEALS
AUGUST 23, 2004
ATLANTA, GA.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee, Case No.03-16404-F
v. District Court Case No.: 8:02-CR-452-T-30MAP

MARK TUGMAN,

Appellant.
_____/

CERTIFICATE OF INTERESTED PERSONS

1. Kevin Darken, Sentencing and appellate counsel for defendant-appellant

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Trial counsel for United States

3. Assistant United States Attorney Adelaide Few
Trial counsel for United States

4. John Fitzgibbons, Trial counsel for defendant-appellate

5. Todd Foster, Sentencing and appellate counsel for defendant-appellant

6. Honorable James S. Moody, Jr., United States District Judge

7. Patrick K. Neal & Associates, victim

8. United States Attorney Paul I. Perez

9. Assistant United States Attorney Tamra Phipps
Chief, Appellate Division

10. Assistant United States Attorney David Rhodes
Appellate counsel for United States

11. Mark Tugman, Defendant-appellant

U.S. COURT OF APPEALS
AUGUST 23, 2004
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-16404-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK R. TUGMAN,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: MARCUS and PRYOR, Circuit Judges

BY THE COURT:

Appellant's motion to re-brief this appeal, in order to raise issues pursuant to Blakely v. Washington, ___ U.S. __, 125 S.Ct. 2531 (2004) is DENIED. U.S. v. Hembree, No. 03-16001, 2004 WL 1873773 (11th Cir. August 23, 2004).

Appellant's alternate motion to remand for resentencing is DENIED.

Appellee's motion to strike Appellant's supplemental authority is GRANTED. See U.S. v. Blasco, 702 F.2d 1315, 1332 n.28 (11th Cir. 1983).

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
SEPTEMBER 8, 2004
THOMAS K. KAHN
CLERK

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee, Case No. 03-16404-FF
v. District Court Case No.: 8:02-CR-452-T-30MAP

MARK R. TUGMAN,

Appellant.

DEFENDANT'S MOTION FOR LIMITED REMAND FOR RESENTENCING PURSUANT TO *BOOKER/FANFAN*

Defendant Mark Tugman, by and through his undersigned counsel, hereby moves pursuant to *United States v. Booker/United States v. Fanfan*, 2005 WL 50108 ____ S.Ct. ___ (January 12, 2005) for this Court to make a limited remand to the district court for purposes of sentencing the Defendant in accordance with the Sixth Amendment to the United States Constitution. In support thereof, Defendant Tugman states as follows:

1. Defendant Tugman was convicted following trial. He was sentenced to 41 months imprisonment in large part because he received a loss amount enhancement and an enhancement for obstruction of justice.

2. Neither the loss amount enhancement nor the obstruction enhancement were proven to the trial jury.

3. At the end of its first opinion in *Booker/Fanfan*, the Supreme Court held that "[a]ny fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or

proved to a jury beyond a reasonable doubt." 2005 WL 50108 at *15.

4. The maximum sentence authorized by the facts established by the jury verdict is six months imprisonment because Defendant Tugman's Guidelines advisory sentencing range without the loss and obstruction enhancements would be 0-6 months imprisonment.

5. At his sentencing hearing and on appeal, Defendant Tugman objected to both the loss enhancement and the obstruction enhancement.

6. The Supreme Court has held that its *Booker/Fanfan* holdings must be applied "to all cases on direct review." 2005 WL 50108 at * 29, citing *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). Since oral argument in this case occurred on January 11, 2005, this case remains on direct review. Consequently, the *Booker/Fanfan* holdings should be applied to this case.

7. As the Supreme Court held in *Griffith,* "failure to apply a newly decided constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. The *Griffith* Court explained that "selective application of new rules violates the principle of treating similarly situated defendants the same". Failure to apply the *Booker/Fanfan* holdings to this case would violate Defendant Tugman's constitutional due process and equal protection rights.

WHEREFORE, this Court should enter an order remanding this case for resentencing in accordance with the Supreme Court's *Booker/Fanfan* decision.

Respectfully submitted,

s/_____

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s/
Attorney

U.S. COURT OF APPEALS
RECEIVED CLERK
JANUARY 18, 2005
ATLANTA, GA.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 03-16404-FF

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

MARK R. TUGMAN,

Defendant-Appellant.

On Appeal from the United States District Court for the Middle District of Florida

---

BEFORE: DUBINA and FAY, Circuit Judges, and GOLDBERG*, Judge.

BY THE COURT:

Appellant's motion for limited remand for resentencing pursuant to Booker/FanFan is DENIED.

---

*Honorable Richard W. Goldberg, Judge, United States Court of International Trade, sitting by designation.

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
FEBRUARY 23, 2005
THOMAS K. KAHN
CLERK

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:02-CR-452-T-30MAP

-vs-

7 July 2003
Tampa, Florida
9:55 a.m.

MARK TUGMAN,

Defendant.

---/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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STENOGRAPHICALLY RECORDED
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BY ECLIPSE

EXCERPT FROM TESTIMONY OF JAMES SCHIER
(CROSS EXAMINATION BY MR. FITZGIBBONS)

******

[90]Q Then after you learned from the bank and then did your homework, you apparently confronted Cheri Searcy; is that correct?

A Uh, no. We -- we didn't -- I didn't, no.

Q Who did?

A I believe she -- the, uh -- we filed a civil suit and got an emergency order confiscating property.

Q Basically you tried to freeze everything that she -- that had her name on it, correct?

A Correct.

Q And you went to a judge, first of all in secret, and got a secret freeze order from the judge, and then executed that freeze order, and then that's when she got notice that you knew about it?

A. Yes.

Q Then after that time did she hire an attorney?

A Yes.

Q Mr. Cole?

A Yes.

Q And then did you participate in negotiations with Mr. Cole and -- you and Mr. Neal?

A Yes.

Q Okay.

[91]Q Then at some point Mark Tugman also -- well, he was sued also, along with Cheri Searcy Tugman, correct?

A Yes.

Q Then did Mr. Tugman, uh, also -- was he also represented by Mr. Cole?

A I don't know.

Q Then under the freeze order and in the context

of the civil litigation, you got, uh, close to a million dollars' worth of property back, correct?

A Yes.

Q And did Mr. Tugman assist in signing things over, or assisting, to your knowledge, in having things returned to Neal?

A Yes.

* * *

EXCERPT FROM TESTIMONY OF JAMES SCHIER (REDIRECT EXAMINATION BY MS. BEDKE

[100]Q Mr. Fitzgibbons asked you a couple of questions about the civil lawsuit, correct?

A Yes.

Q And just so I'm clear, did you indicate that Mr. Tugman, as well as Cheri Tugman, agreed to turn over certain assets, correct?

A Yes.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:02-CR-452-T-30MAP

-vs-

7 July 2003
Tampa, Florida
9:55 a.m.

MARK TUGMAN,

Defendant.

---/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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EXCERPT FROM TESTIMONY OF PATRICK NEAL
(DIRECT EXAMINATION BY MS. BEDKE)

MS. BEDKE

[113]Q Did you have occasion to speak with Mr. Tugman after you initiated the legal -- civil legal proceedings that you've described?

A I did.

Q When was the first time that you met with Mr. Tugman after taking that legal civil action?

A We took the legal action on Monday morning, December 18, 2000. We got a judge's order in, and we started levying on his possessions. I was in the office of Mr. Chuck Johnson, who's my lawyer, and Mr. Tugman was on the phone. Uh, and I believe in the course of his calling our legal office,

we arranged for a meeting later that afternoon –

Q Did you --

A -- to meet directly with Mr. Tugman and Mrs. Searcy, the afternoon that we levied on all of his stuff.

Q I'm sorry to have interrupted you. [114] What date was that?

A Monday, December 18th, 2000.

Q And did you have that meeting?

A We did.

Q On the same date?

A About, I would guess, four or maybe five o'clock in the afternoon.

Q Where did you meet?

A In the course of learning about Mr. Tugman, we knew he had, uh, weapons and all sorts of things that was focused on, so I wanted to meet in a public place. We met him at a Denny's restaurant on State Road 70.

Q And, uh, did Mr. Tugman have anything to say to you during the course of that meeting?

A He did. Uh, Mrs. Bedke, this is -- you don't have meetings like this very often. We ordered a Coke, and Mrs. Searcy and Mr. Tugman came in. Uh, I think the general impression I got is they wanted to sue for peace. To me, they --

the sheriff had visited their house four or five times already that day; had levied on their vehicles; uh, had served them with a summons perhaps 20 pages long, listing their assets. And I feel they wanted to, uh, I'll say come clean, and also they wanted to end whatever repercussions might manifest themselves from what they had done.

[115]Q And just to be clear, this sheriff was at their home in connection with the seizure of the assets only, correct?

A. Correct.

Q Did Mr. Tugman, uh, say anything to you that gave you the impression you just described?

A Oh, yes. Mr. Tugman did most of the talking in every meeting we had with Mr. Tugman and Mrs. Searcy.

Q What did Mr. Tugman say on that first date, December 18th, 2000, during the meeting at Denny's?

A Well, I think the -- the clear impression, the overall impression was that he would give up all of the assets, uh, if I would agree that there would be no criminal proceedings.

Q Did you make such an agreement?

A I have a good lawyer, Mrs. Bedke, and he made it very clear and wrote me letters and extensive correspondence that we couldn't threaten criminal prosecution to collect a civil debt. So, I was -- I'm -- I'm a former elected official, I'm careful, and I chose never to answer him when he made that offer. But the focus was that he would give up everything he

had if we wouldn't pursue criminal proceedings.

Q You indicated that you didn't mention or threaten criminal proceedings, correct?

A We never threatened criminal proceedings.

[116]Q I take it you also, uh, didn't promise anything away, correct?

A We did not.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:02-CR-452-T-30MAP

-vs-

10 July 2003
Tampa, Florida
9:30 a.m.

MARK TUGMAN,

Defendant.

---/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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EXCERPT FROM TESTIMONY OF CHARLES JOHNSON
(DIRECT EXAMINATION BY MS. BEDKE)

* * *

[154] Q Did you have occasion to meet with the defendant Tugman as a result of the filing of your civil legal [155] action?

A Yes, on more than one occasion.

Q When was the first such meeting after the filing of the legal action?

A The late afternoon or evening of the 18th of December of the year 2000.

Q And was that the date that the legal action was signed -- was filed?

A Yes, m'am.

Q And where was this meeting?

A It was at a Denny's restaurant on State Road 70 in East Bradenton, Florida.

Q Who was present for the meeting?

A Mr. Neal, myself and Mr. and Mrs. Tugman were there.

Q Did you happen to note how Mr. and Mrs. Tugman arrived for the meeting at Denny's?

A Mr. and Mrs. Tugman -- yes. Mr. and Mrs. Tugman arrived in a BMW, which is the subject of the lawsuit. It was the -- I think it's the Z-3 convertible, is the right acronym.

Q And how would you describe that vehicle, in general terms?

A It was a two-seat BMW convertible.

Q Is it like a little sports car model?

A Yes, m'am.

[156] Q During this meeting did you have occasion to speak with Mr. Tugman?

A Yes.

Q Did Mr. Tugman make any mention about a possible criminal proceeding?

A Mr. Tugman had a concern about that, yes.

Q What did he say?

A He had a concern that there might be a criminal proceeding. And I told him that I was interested in recovering

the assets which had been taken, and any assets that had been purchased with the funds from Mr. Neal's entities.

It was -- I was not interested in discussing the criminal matter with him, I just wanted to get the money back which had been taken.

Q But what did Mr. Tugman say, if anything, about the possibility of criminal proceedings?

A M. Tugman did -- he hoped they would not come to fruition.

Q And did he, uh, say thing to you, uh -- (Pause.) Let's see. Did he say anything to you, uh, by the way of suggestion for a way to avoid the possibility of criminal proceedings?

A Mr. Tugman suggested to me that if they repaid all of [157] the money that it wouldn't be necessary, among other things that were said that night.

Q Okay. Was the idea that if everything was given back, just don't prosecute?

A Right. At that time the lawsuit was filed for a little bit over a million dollars based on the preliminary investigation we had been able to accomplish at that time.

And Mr. Tugman actually came to the meeting and identified for us -- "us" being Mr. Neal and I -- assets in excess of the amount that we had sued for. We sued for a million seventy thousand and a little bit more.

And he came and explained to me that he thought he already had assets of a million-one -- actually a little bit more than that -- that he felt he could give us and everything should go away.

Q Including the criminal proceedings?

A Yes.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:02-CR-452-T-30MAP

-vs-

11 July 2003
Tampa, Florida
8:00 a.m.

MARK TUGMAN,

Defendant.
----------/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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CLOSING ARGUMENT (EXCERPT)
MS. BEDKE FOR THE UNITED STATES

... [104] ... There was also mention made of the civil legal action that followed the Neal firm's discovery of Cheri Tugman's embezzlement. And I would note that there was testimony that Mr. and Mrs. Tugman turned over assets, but why?

Ladies and gentlemen, you heard repeatedly from Mr. Schier, I believe also from Mr. Neal, certainly from Charles Johnson, the lawyer who testified yesterday afternoon, that the purpose for turning those assets over was articulated by the defendant. Take this stuff. Don't press criminal charges. That was the intention.

Ladies and gentlemen, the Government submits that this is not the act of someone who just is trying to make [105] good out of the goodness of his heart, but rather that the evidence shows that that is -- that that shows evidence of consciousness of guilt.

The Government submits that the evidence shows that Mr. Tugman knew he was in trouble, along with Cheri Tugman, and that he wanted to do everything he could, including turning over houses and cars and whatever else he had at his disposal to avoid criminal charges.

And you heard from Mr. Johnson and Mr. Schier, and again, I believe, Mr. Neal, that they have no control over that. They can't threaten it, and they can't promise it away because that's not their authority.

So, to them that wasn't the issue. Their concern, as Mr. Neal said, was capturing as many of those assets that had been taken or were represented by the fraudulent proceeds as was possible before that (sic) they were dissipated or there was a bankruptcy filing, or something else happened.

But the purpose articulated by the defendant was to avoid criminal prosecution. Consciousness of guilt.

* * *

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:02-CR-452-T-30MAP

-vs-

10 July 2003
Tampa, Florida
9:30 a.m.

MARK TUGMAN,

Defendant.

---/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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EXCERPT FROM TESTIMONY OF AGENT DIANE KNOTT
(REDIRECT EXAMINATION BY MS. BEDKE)

* * *

...[96]...Q. All right.

And I believe he asked you that – if Mr. Tugman had made any of the original duplicate checks or the altered checks, correct?

A. Correct.

Q. And your answer was what?

A. No.

Q. All right.

Who made those?

A. Cheri Searcy.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:02-CR-452-T-30MAP

-vs-

10 July 2003
Tampa, Florida
9:30 a.m.

MARK TUGMAN,

Defendant.

---/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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BY ECLIPSE

EXCERPT FROM TESTIMONY OF MARK TUGMAN
(REDIRECT EXAMINATION BY MS. BEDKE)

* * *

...[255]...Q. Well, you had constructive possession of them when they were deposited into your First Union prime equity line account, correct?

A. I didn't deposit them into any account.

Q. But they went into your account, and they became yours because they're in your account, aren't they?

A. I didn't make the payments.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

Case No. 8:02-CR-452-T-30MAP

-vs-

11 July 2003
Tampa, Florida
8:00 a.m.

MARK TUGMAN,

Defendant.

---/

TRANSCRIPT OF TRIAL PROCEEDINGS
BEFORE THE HONORABLE JAMES S. MOODY, JR.,
UNITED STATES DISTRICT COURT JUDGE

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CHARGE CONFERENCE (EXCERPT)
MS. BEDKE FOR THE UNITED STATES

* * *

...[28]...THE COURT: How does this give you anything more than you already have under the 513(a) instruction?

MS. BEDKE: Well, Your Honor, because, uh. clearly the evidence does not demonstrate that Mr. Tugman either made or altered these, uh – these checks, these securities of an organization.

At best, Your Honor, we can argue that he possessed them constructively when they were deposited into some of his accounts.

Supreme Court, U.S.
JUN 15 2005
OFFICE OF THE CLERK

(2)

No. 04-1387

In the Supreme Court of the United States

MARK R. TUGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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Counsel of Record
JOHN C. RICHTER
Acting Assistant Attorney General
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QUESTIONS PRESENTED

1. Whether the Eleventh Circuit abused its discretion by applying a longstanding procedural bar rule to decline to consider a claim of error under *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), because petitioner did not raise that argument in his opening brief.

2. Whether the district court committed plain error in petitioner's criminal trial by allowing testimony about settlement negotiations in a related civil lawsuit.

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In the Supreme Court of the United States

No. 04-1387

MARK R. TUGMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-3) is unreported. The order denying petitioner's motion for bail pending appeal (Pet. App. 14) is unreported. The order denying petitioner's motion to re-brief the appeal, and granting the government's motion to strike petitioner's supplemental brief (Pet. App. 33-34), is unreported. The order denying petitioner's motion for a limited remand for resentencing (Pet. App. 38) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 2005. The petition for a writ of certiorari was filed on April 13, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner was convicted, following a jury trial, of one count of conspiracy to possess forged securities, to make false statements for the purpose of influencing a financial institution in acting upon a loan or application, and to engage in unlawful monetary transactions, in violation of 18 U.S.C. 371; 12 counts of possessing forged securities, in violation of 18 U.S.C. 513(a); two counts of making false statements for the purpose of influencing a financial institution in acting upon a loan or application, in violation of 18 U.S.C. 1014(a); and two counts of engaging in unlawful monetary transactions, in violation of 18 U.S.C. 1957. Pet. 3-4; Gov't C.A. Br. 3-4. The court of appeals affirmed. Pet. App. 1-3.

1. Cheri Searcy, who was petitioner's mistress (and later his wife), embezzled nearly $2 million from her employer, Patrick K. Neal and Associates, between 1991 and 2000. Pet. C.A. Br. 4. She and petitioner used the funds obtained to support an extravagant lifestyle, purchasing luxury cars, a speedboat, airplanes, and a house. In December 2000, petitioner and his wife were served with a civil complaint filed by Neal and Associates. In November 2002, a federal grand jury returned a criminal indictment.

At the criminal trial, two witnesses from Neal and Associates, and the firm's attorney, testified about a meeting they had with petitioner and his wife on December 18, 2000. James Schier testified that petitioner agreed to turn over certain assets to Neal and Associates. Pet. C.A. Br. 26. Patrick Neal testified that his "overall impression [from the meeting] was that [petitioner] would give up all of the assets * * * if [Mr. Neal] would agree that there would be no criminal pro-

ceedings." *Ibid.* The attorney, Chuck Johnson, testified that petitioner suggested that if he repaid all of the money, a criminal prosecution would not be necessary. *Id.* at 27. Petitioner did not object at trial to the introduction of that testimony.

Pursuant to the Sentencing Guidelines, the district court imposed a sentence of 41 months of imprisonment, and ordered petitioner to forfeit an airplane, a boat, and approximately $2 million. Gov't C.A. Br. 4-5.

2. On appeal, petitioner raised 12 claims of error involving his trial and sentencing. See Pet. C.A. Br. 10-35. Among other things, petitioner claimed for the first time that the district court had committed plain error by permitting the prosecution to introduce evidence of civil settlement negotiations, which he argued violated Federal Rule of Evidence 408. *Id.* at 25-29. Petitioner raised no constitutional claim with respect to judicial factfinding in his sentencing in the district court or in his opening brief on appeal. Pet. 4.

After the petitioner's opening brief was filed, this Court issued its decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), holding that judicial factfinding that increased a state guidelines sentence violated the Sixth Amendment. Petitioner then filed a second renewed motion for bond pending appeal raising a *Blakely* challenge to his sentence. Pet. App. 4-6.[1] The court of appeals denied that motion, citing circuit precedent establishing that the court ordinarily will not consider issues not raised in an opening brief. See Pet. App. 14 (citing *United States* v. *Ford*, 270 F.3d 1346, 1347 (11th Cir. 2001), cert. denied, 535 U.S. 1098 (2002); *United States*

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[1] Petitioner's earlier motion for release on bond pending appeal did not raise any *Blakely*-type claim.

v. *Ardley*, 242 F.3d 989, 990 (11th Cir.), cert. denied, 533 U.S. 962 (2001) and 535 U.S. 979 (2002); *United States* v. *Nealy*, 232 F.3d 825, 830 (11th Cir. 2000), cert. denied, 534 U.S. 1023 (2001)). The court denied petitioner's subsequent motions to strike the existing briefs to allow rebriefing, or in the alternative to remand for resentencing. Pet. App. 33. The court of appeals affirmed petitioner's conviction and sentence, *id.* at 1-3, concluding that there was "no merit to any of the arguments [petitioner] makes in this appeal." *Id.* at 2.

3. In *United States* v. *Booker*, 125 S. Ct. 738 (2005), this Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 757-769 (Breyer, J., for the Court).

4. In *United States* v. *Dockery*, 401 F.3d 1261 (2005) (per curiam), the Eleventh Circuit held, in a case that this Court had remanded for reconsideration in light of *Booker*, that the defendant would be deemed to have abandoned his Sixth Amendment challenge to the Guidelines by failing to raise it in his opening brief. *Id.* at 1262-1263. The court of appeals stated that it saw nothing

> in the Supreme Court's remand order, which is cast in the usual language, requiring that we treat the case as though the * * * issue had been timely raised in this Court. In the absence of any requirement to the contrary in either [*Booker*] or in the order remanding this case to us, we apply our well-established rule that

> issues and contentions not timely raised in the briefs are deemed abandoned.

Ibid. (quoting *Ardley*, 242 F.3d at 990); accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Senn*, 128 Fed. Appx. 96 (11th Cir. 2005) (same).

ARGUMENT

Petitioner contends (Pet. 7, 10-14) that the Eleventh Circuit's practice of treating as abandoned *Booker* and *Blakely* claims that are not raised in a party's initial brief contravenes the retroactivity principle of *Griffith* v. *Kentucky*, 479 U.S. 314 (1987), and is inconsistent with traditional plain-error review (Pet. 7, 14-19). Petitioner contends that the Eleventh Circuit's "non-discretionary rule" (Pet. 7) "conflicts with the law in every other circuit." Pet. 8. Petitioner also argues (Pet. 22-27) that the district court committed reversible plain error by permitting testimony at his criminal trial about settlement negotiations in the related civil suit by Neal and Associates. Petitioner's contentions lack merit, and further review is not warranted.

1. a. In *Griffith*, this Court held that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases * * * pending on direct review or not yet final." 479 U.S. at 328. Because the petitioner in *Griffith* had preserved the claim on which he sought review, the Court did not have occasion to consider the interplay between the retroactivity rule adopted in that case and principles of waiver, forfeiture, and other prudential doctrines. See *id.* at 317, 318.

Application of procedural default rules is consonant with the retroactivity principle of *Griffith*. *Griffith* concluded that retroactive application of new rules on direct appeal was necessary both because of "the nature of judicial review" and in order to "treat[] similarly situated defendants the same." 479 U.S. at 322-323. That rationale is in no way inconsistent with application of procedural default rules to bar consideration of claims that have not been adequately preserved. Defendants who have not preserved a claim of error are not "similarly situated" (*id.* at 323) to those who have. Cf. *Shea* v. *Louisiana*, 470 U.S. 51, 59-60 (1985) (holding that it is not inequitable to draw a distinction between a defendant who raises a claim on collateral attack and one who raises it on direct review because "[t]he one litigant already has taken his case through the primary system" and "[t]he other has not"). Application of procedural bar rules does not offend principles requiring the retroactive application of new constitutional rules to cases open on direct review.

> Retroactivity doctrine answers the question of which cases a new decision applies to, assuming that the issue involving that new decision has been timely raised and preserved. Procedural bar doctrine answers the question of whether an issue was timely raised and preserved, and if not, whether it should be decided anyway. It makes no more sense to say that a procedural bar should not be applied in this situation because doing so undermines or frustrates retroactive application of a Supreme Court decision, than it does to say that procedural bars should not be applied in any situation because doing so undermines or frustrates the constitutional doctrines and com-

mands underlying the issue that is held to be defaulted.

United States v. *Ardley*, 273 F.3d 991, 992 (11th Cir. 2001) (Carnes, J., concurring in denial of rehearing en banc), cert. denied, 533 U.S. 979 (2002).

On several occasions, this Court has indicated that the retroactivity principle embodied in *Griffith* is in no way inconsistent with the application of procedural default rules. In *Shea* v. *Louisiana*, *supra*, for example, the Court held that the rule announced in *Edwards* v. *Arizona*, 451 U.S. 477 (1981), would be applied retroactively to cases pending on direct review. 470 U.S. at 59. In doing so, the Court explicitly noted that the retroactive application of *Edwards* was "subject, of course, to established principles of waiver, harmless error, and the like." *Id.* at 58 n.4. Similarly, in *Booker* itself, the Court stated that while courts were bound to apply its holding "to all cases on direct review," 125 S. Ct. at 769 (citing *Griffith*, 479 U.S. at 328), "we expect reviewing courts to apply ordinary prudential doctrines," including, specifically, the plain error doctrine for claims that have not been preserved. *Ibid.* See also *Johnson* v. *United States*, 520 U.S. 461, 467 (1997) (noting that rule of *United States* v. *Gaudin*, 515 U.S. 506 (1995), applied retroactively under *Griffith*, but unpreserved claims were subject to review only for plain error); *Harper* v. *Virginia Dep't of Taxation*, 509 U.S. 86, 104 n.1 (1993) (Scalia, J., concurring) (noting, as the Court extended the holding of *Griffith* to civil cases, that "a party may procedurally default on a claim in either [the civil or

criminal] context").[2] This Court has never suggested the contrary.

b. Petitioner contends (Pet. 14-19) that the decision below is inconsistent with the principles of plain error review reflected in Rule 52(b) of the Federal Rules of Civil Procedure. That argument lacks merit. As the Court observed in *United States* v. *Olano*, 507 U.S. 725 (1993), "'[n]o procedural principle is more familiar to this Court than that a constitutional right,' or a right of any other sort, 'may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.'" *Id.* at 731 (quoting *Yakus* v. *United States*, 321 U.S. 414, 444 (1944)). In *Olano*, this Court observed that Rule 52(b) provides only "a limited power to correct errors that were not timely raised in district court." *Ibid.* The Court did not indicate that Rule 52(b) prescribed the *sole* procedural bar rule that courts could employ and that courts could adopt no additional procedural requirements. And in *Booker*, the Court said that it "expect[ed] reviewing courts to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain error' test." 125 S. Ct. at 769 (emphasis added). *Booker*'s language clearly implied that "plain error" is

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[2] Accord, *e.g.*, *United States* v. *Humphrey*, 287 F.3d 422, 442 (6th Cir. 2002) (noting that although *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), applies retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to plain error review); *United States* v. *Oaten*, 286 F.3d 622, 634 (2d Cir. 2002) (same); *United States* v. *Wheat*, 278 F.3d 722, 739 (8th Cir. 2001) (same), cert. denied, 537 U.S. 850 (2002); *United States* v. *Kegs*, 133 F.3d 1282, 1285-1286 (9th Cir.) (en banc) (holding that although rule of *Gaudin* applied retroactively to cases on direct review under *Griffith*, unpreserved claims were subject to review only for plain error), cert. denied, 525 U.S. 891 (1998).

only one of a number of "prudential doctrines" that may preclude relief; abandonment is another.

Although this Court observed in *Olano* that "Rule 52(b) should be employed in those circumstances in which a miscarriage of justice would otherwise result," 507 U.S. at 736 (quoting *United States* v. *Young*, 470 U.S. 1, 15 (1985)), nothing in the Eleventh Circuit's application of its procedural bar rule is inconsistent with that statement. Petitioner contends (Pet. 13) that the Eleventh Circuit's procedural bar rule "precludes its panels from even *deciding* whether a manifest injustice would occur" and that the rule is therefore "the equivalent of an absolute jurisdictional bar to review of a manifest injustice." Pet. 17; see also Pet. 12 (stating that rule "bars *all* review, including * * * review for manifest injustice"); Pet. 7, 8 (stating that rule is "non-discretionary"); Pet. 19 ("the Eleventh Circuit's rule allows for no exceptions, is non-discretionary and essentially jurisdictional in nature"). That contention is incorrect. For example, the court of appeals has addressed claims of *Booker* error although they were not raised in the defendant's opening brief where the government has conceded the error. See *United States* v. *Dacus*, No. 04-15319, 2005 WL 1017985, at *1 (11th Cir. May 3, 2005) (per curiam) ("Although we ordinarily refuse to consider an argument not raised in an initial brief, we consider the argument that Dacus's sentence was erroneous under *Booker* because both parties have joined the issue without objection.") (citing *United States* v. *Levy*, 379 F.3d 1241, 1242-1243 (11th Cir. 2004), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005)). In addition, the Eleventh Circuit has explicitly recognized that it has the authority to relieve litigants of the consequences of failing to raise an issue in an opening brief and to address

an issue on the merits where manifest injustice would otherwise result.[3] The court specifically determined that no manifest injustice would result if it declined to consider untimely *Blakely* claims. See *Levy*, 379 F.3d at 1243 n.3 ("'there would be no miscarriage of justice if we decline to address' *Blakely*-type issues not raised in opening briefs on appeal").

2. Petitioner also contends (Pet. 8) that the Eleventh Circuit's application of its procedural bar rule "conflicts with the law in every other circuit" and that this Court's review is necessary to resolve the circuit conflict.

a. The Federal Rules of Appellate Procedure provide that an appellant's brief "must contain * * * appellant's contentions and the reasons for them." Fed. R. App. P. 28(a)(9)(A). The courts of appeals have without exception interpreted that provision to establish a general prudential rule that "[a]n appellant waives any issue which it does not adequately raise in its initial brief." *Playboy Enters. v. Public Serv. Comm'n*, 906 F.2d 25, 40 (1st Cir.), cert. denied, 498 U.S. 959 (1990).[4] The courts

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[3] See, *e.g.*, *United States v. Rivera Pedin*, 861 F.2d 1522, 1526 n.9 (11th Cir. 1988) (pursuant to Rule 2 of the Federal Rules of Appellate Procedure, considering an issue raised only in co-defendant's brief, despite defendant's failure to adopt by reference his co-defendant's arguments); *Granueua v. Johnson*, 846 F.2d 675 (11th Cir. 1988) (vacating judgment based on issue raised sua sponte by the court, pursuant to Rule 2); see also *United States v. Levy*, 391 F.3d 1327, 1335 (11th Cir. 2004) (Hull, J., concurring in denial of rehearing en banc) ("The issue is not whether this Court has the power to consider issues not raised in the initial brief; of course it does."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005).

[4] Accord, *e.g.*, *United States v. Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) ("It is well established that an argument not raised on appeal is deemed abandoned, and we will not ordinarily consider such an argu-

of appeals have recognized that that rule is not jurisdictional and therefore that courts have authority, in the exercise of their discretion, to address issues not timely raised by the parties. See, *e.g.*, *United States* v. *Miranda*, 248 F.3d 434, 443-444 (5th Cir. 2001) (noting that "the issues-not-briefed-are-waived rule is a prudential construct that requires the exercise of discretion" and that the court may consider an issue that was not

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ment unless manifest injustice otherwise would result.") (internal citations and quotation marks omitted); *Ghana* v. *Holland*, 226 F.3d 175, 180 (3d Cir. 2000) ("It is well settled that if an appellant fails to comply with these [Rule 28] requirements on a particular issue, he normally has abandoned and waived that issue on appeal.") (quoting *Kost* v. *Kozakiewicz*, 1 F.3d 176, 182 (3d Cir. 1993)) (alterations omitted); *Shopco Distrib. Co.* v. *Commanding Gen. of Marine Corps Base*, 885 F.2d 167, 170 n.3 (4th Cir. 1989) (holding that any claim not raised in a party's initial brief will be deemed waived) (collecting authorities); *United States* v. *Miranda*, 248 F.3d 434, 443 (5th Cir. 2001) ("Failure to satisfy the requirements of Rule 28 as to a particular issue ordinarily constitutes abandonment of the issue."), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *Bickel* v. *Korean Air Lines Co.*, 96 F.3d 151, 153 (6th Cir. 1996) ("We normally decline to consider issues not raised in the appellant's opening brief.") (quoting *Priddy* v. *Edelman*, 883 F.2d 438, 446 (6th Cir. 1989)), cert. denied, 519 U.S. 1093 (1997); *Holman* v. *Indiana*, 211 F.3d 399, 406 (7th Cir.) (finding arguments not raised in initial brief waived), cert. denied, 531 U.S. 880 (2000); *Sweat* v. *City of Fort Smith*, 265 F.3d 692, 696 (8th Cir. 2001) ("[C]laims not raised in an initial appeal brief are waived."); *Greenwood* v. *FAA*, 28 F.3d 971, 977 (9th Cir. 1994) ("We review only issues which are argued specifically and distinctly in a party's opening brief."); *Adams-Arapahoe Joint Sch. Dist. No. 28-J* v. *Continental Ins. Co.*, 891 F.2d 772, 776 (10th Cir. 1989) (holding that "[a]n issue not included in either the docketing statement or the statement of issues in the party's initial brief is waived on appeal"); *Maryland People's Counsel* v. *FERC*, 760 F.2d 318, 319-320 (D.C. Cir. 1985) (deeming an issue waived where a party did not raise it until supplemental briefing); *Becton Dickinson & Co.* v. *C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990) ("an issue not raised by an appellant in its opening brief * * * is waived").

timely raised "where substantial public interests are involved"), cert. denied, 534 U.S. 980 (2001) and 1086 (2002); *United States* v. *Quiroz*, 22 F.3d 489, 490-491 (2d Cir. 1994) (court will review issue not raised in the brief where manifest injustice would otherwise result); *Lee* v. *Murphy*, 844 F.2d 628, 634 (9th Cir. 1988) (same). See also Fed. R. App. P. 2 (granting courts discretion to suspend most rules for "good cause"). As noted above, see pp. 9-10, *supra*, the Eleventh Circuit has recognized that it has the authority to relieve litigants of the consequences of default and address an issue on the merits where manifest injustice would otherwise result. In the exercise of its discretion, however, the Eleventh Circuit has declined to exempt *Booker* and *Blakely* claims from the operation of its longstanding rule that it will not consider claims unless they were timely raised in the appellant's opening brief. See, *e.g.*, *Dockery*, 401 F.3d at 1262-1263; *Levy*, 379 F.3d at 1243 n.3; see also *United States* v. *Ardley*, 242 F.3d 989, 990 (11th Cir.) (declining to exempt claims under *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000), from operation of rule), cert. denied, 533 U.S. 962 (2001).

Petitioner asserts (Pet. 8-9 & nn.3-4) that the Eleventh Circuit's application of the procedural bar rule "conflicts with the law in every other circuit" (Pet. 8) because other courts have reviewed the merits of challenges based on the intervening decisions of this Court in *Booker*, *Blakely*, and *Apprendi*, even if those challenges were not raised in the defendant's opening brief. The vast majority of the decisions that petitioner cites are inapposite. A few of the cited opinions simply conclude that it was appropriate under the circumstances to consider those claims in that posture because this Court recently had clarified the law, without citing or discuss-

ing the ordinary rule that courts will not entertain issues not raised in a party's opening brief.[5] Most of the others simply discuss (and often reject) claims raised in supplemental briefs without addressing the appropriateness of reviewing tardily raised claims.[6] Thus, it appears that most courts that have addressed claims in this posture have not explicitly declined to apply the procedural bar rule, and thus those decisions cannot be said to "conflict" with the decision below.

Petitioner cites only one 20-year-old case (Pet. 8 & n.3) in which a court of appeals entertained a claim raised for the first time in supplemental briefing in light of intervening decisions of this Court, in which the appellate court explicitly considered whether to apply the

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[5] See *United States* v. *Oliver*, 397 F.3d 369, 377 n.1 (6th Cir. 2005) (concluding that it was appropriate to consider claim raised in letter filed pursuant to Fed. R. App. P. 28(j)); *United States* v. *Castro*, 382 F.3d 927, 929 & n.3 (9th Cir. 2004) (concluding that it was appropriate to consider claim sua sponte).

[6] See *United States* v. *Fox*, 396 F.3d 1018 (8th Cir. 2005); *United States* v. *Bruce*, 396 F.3d 697 (6th Cir.), vacated in part on reh'g, 405 F.3d 1034 (6th Cir. 2005); *United States* v. *Burgess*, 119 Fed. Appx. 852 (8th Cir. 2005); *United States* v. *Schaefer*, 384 F.3d 326, 330-331 (7th Cir. 2004); *United States* v. *Moore*, 109 Fed. Appx. 503, 505 n.2 (3d Cir. 2004) (denying motion to file supplemental brief "as futile" because claims of error were clearly meritless); *United States* v. *Delgado*, 256 F.3d 264, 280 (5th Cir. 2001); *United States* v. *Cernobyl*, 255 F.3d 1215 (10th Cir. 2001); *United States* v. *Terry*, 240 F.3d 65, 72-73 (1st Cir.), cert. denied, 532 U.S. 1023 (2001); *United States* v. *Poulack*, 236 F.3d 932, 935-938 (8th Cir.), cert. denied, 534 U.S. 864 (2001); *United States* v. *Rogers*, 118 F.3d 466, 471 (6th Cir. 1997). *United States* v. *Hammond*, 381 F.3d 316, 344 & n.14 (4th Cir. 2004) (en banc), vacated on other grounds, 125 S. Ct. 1051 (2005), is inapposite because the supplemental briefing on *Blakely* in that case merely supported a timely *Apprendi* challenge to judicial factfinding under the Guidelines that the defendant had already raised in his opening brief.

ordinary prudential rule that issues not raised in an opening brief will be deemed abandoned. That purported conflict does not warrant this Court's consideration. The case discussed the issue only briefly in a footnote, see *United States* v. *Byers*, 740 F.2d 1104, 1115 n.11 (D.C. Cir. 1984), and the court may have exercised its discretion to proceed to the merits of the argument in that case only because the court concluded it clearly lacked merit. See 740 F.2d at 1118 ("obvious" that conditions necessary for relief not met); *id.* at 1121 (noting claim has been "uniformly rejected by other circuits"). More recent decisions of that court suggest that it does not consider itself obligated to consider tardily raised claims based on intervening precedent. See *Kinney* v. *District of Columbia*, 994 F.2d 6, 10 (D.C. Cir. 1993) (citing *Byers* for the proposition that "we have indicated that we *might* entertain a new argument on appeal if it were justified by * * * an intervening change in the law") (emphasis added).

Review also is not warranted at this time because several courts of appeals currently are refining their analysis of when it is appropriate to consider tardily raised claims based on intervening precedent. The Fifth Circuit, which previously had entertained tardily raised claims based on intervening Supreme Court precedents,[7] recently has followed Eleventh Circuit precedent to conclude that "absent extraordinary circumstances, we will not consider *Booker* issues raised for the first time in a petition for rehearing." *United States* v. *Taylor*, No. 03-10167, 2005 WL 1155245 (5th Cir. May 17, 2005) (per curiam) (citing, *inter alia*, *Ardley*); *United States* v.

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[7] See *Miranda*, 248 F.3d at 443-444 (discussing *Apprendi* claim although defendant did not raise claim in opening brief); *United States* v. *Garcia*, 242 F.3d 593, 599 & n.5 (5th Cir. 2001) (same).

Hernandez-Gonzalez, 405 F.3d 260, 261-262 (5th Cir. 2005) (per curiam) (citing, *inter alia*, *Levy*, 379 F.3d at 1242, and *Ardley*); see also *United States* v. *Lewis*, No. 04-10102, 2005 WL 1394949 (5th Cir. June 14, 2005) (per curiam) (following *Taylor*). The First Circuit, on the other hand, only last month concluded that the "substantial change in the applicable law wrought by the Supreme Court's decisions in *Blakely* and *Booker* * * * constitutes an 'exceptional circumstance'" in which the court would decline to apply its general rule that tardily raised issues "are generally considered waived." *United States* v. *Vazquez-Rivera*, 407 F.3d 476, 487 (1st Cir. 2005).[8]

b. Even if the courts of appeals were to settle on differing approaches to when to address claims not raised in a defendant's opening brief, rules governing the consideration of unpreserved claims may appropriately be viewed as local rules that can differ from circuit to cir-

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[8] The Fourth Circuit recently stated in a footnote, and without briefing or argument by the parties on the issue, that "[a]lthough appellate contentions not raised in an opening brief are normally deemed to have been waived, the *Booker* principles apply in this proceeding because the Court specifically mandated that we 'must apply [*Booker*] . . . to all cases on direct review.'" *United States* v. *Washington*, 398 F.3d 306, 312 n.7 (4th Cir. 2005) (citation omitted) (quoting *Booker*, 125 S. Ct. at 769 (Breyer, J., for the Court)). The court failed to note that, in the very same paragraph, *Booker* made clear that "we expect reviewing courts to apply ordinary prudential doctrines" in determining whether resentencing was warranted in a given case. 125 S. Ct. at 769 (Breyer, J., for the Court). The government was unable to seek rehearing in that case because the court of appeals, after the time for filing a petition for rehearing had expired, denied the timely filed joint motion of the parties for an extension of time in which to file a rehearing petition. The Fourth Circuit should be given an opportunity to reconsider that erroneous conclusion in an appropriate case.

cuit. So long as such local rules are reasonable, see *Thomas* v. *Arn*, 474 U.S. 140, 146-148 (1985), and consistent with Acts of Congress and the Federal Rules of Appellate Procedure, see Fed. R. App. P. 47(a), there is no requirement of "uniformity among the circuits in their approach to [such] rules." *Ortega-Rodriguez* v. *United States*, 507 U.S. 234, 251 n.24 (1993). Indeed, this Court specifically has acknowledged the power of courts of appeals to adopt rules restricting the consideration of issues not raised in a timely manner. In *Thomas* v. *Arn*, *supra*, the Sixth Circuit had promulgated a rule providing that failure to file objections with the district court to a magistrate's recommendation waived the right to appellate review of a district court judgment adopting that recommendation. This Court held that the Sixth Circuit had not abused its discretion by adopting that rule. The Sixth Circuit's "nonjurisdictional waiver provision," like the rule at issue here, would ordinarily "preclud[e] appellate review of any issue" not raised in the manner prescribed, although the court of appeals could "excuse the default in the interests of justice." 474 U.S. at 147-148, 155. Noting that such a rule was supported by sound considerations of judicial economy, *id.* at 148, this Court concluded that the courts of appeals had authority to adopt "procedures deemed desirable from the viewpoint of sound judicial practice although in nowise commanded by statute or by the Constitution." *Id.* at 146-147 (quoting *Cupp* v. *Naughten*, 414 U.S. 141, 146 (1973)).

Procedural bar rules of the sort at issue here promote efficiency by avoiding piecemeal briefing of appeals and ensuring that the appellee has the opportunity to respond to all issues raised by the appellant without supplemental briefing. Such rules are especially impor-

tant because of the courts of appeals' increasingly heavy caseloads. Petitioner contends (Pet. 13 n.4, 22) that the court of appeals' rule should be rejected because it would give litigants an incentive to raise numerous claims that are precluded by existing precedent. Although the same could be said of any procedural default rule that attaches consequences to the failure to raise a claim, this Court rejected the position that the futility of raising a claim under existing law wholly excuses a litigant from preserving it. See, *e.g.*, *Johnson*, 520 U.S. at 467-468 (reviewing unpreserved claim only for plain error although the argument was foreclosed by "near-uniform precedent both from this Court and from the Courts of Appeals"). See also *United States* v. *Levy*, 391 F.3d 1327, 1332 (11th Cir. 2004) (Hull, J., concurring in the denial of rehearing en banc) ("If defendants were going to raise a long and useless laundry list of objections, they already would have been doing exactly that in the district court so objections could receive full *de novo* review [on appeal], rather than plain-error review."), vacated, No. 04-8942, 2005 WL 540692 (June 6, 2005); *id.* at 1333 (noting that "numerous defendants" had properly preserved their claims by "rais[ing] *Apprendi*-type arguments in their challenges to enhancements under the federal Sentencing Guidelines") (collecting cases).

This Court has denied review in a number of cases in which the Eleventh Circuit declined to entertain a claim under the intervening decisions in *Blakely* or *Apprendi* solely because it was not raised in the petitioner's opening brief, see, *e.g.*, *Ardley* v. *United States*, 535 U.S. 979 (2002) (No. 01-8714); *Nealy* v. *United States*, 534 U.S. 1023 (2001) (No. 01-5152); *Padilla-Reyes* v. *United States*, 534 U.S. 913 (2001) (No. 01-5284), and denied

review in several cases that specifically challenged application of the procedural bar rule in that context. See, *e.g.*, *Phillips* v. *United States*, 536 U.S. 961 (2002) (No. 01-5718) (denying review when petitioner challenged application of rule to bar consideration of *Apprendi* claim); *Garcia* v. *United States*, 534 U.S. 823 (2001) (No. 00-1866) (denying review when Eleventh Circuit declined, on remand from this Court for reconsideration in light of *Apprendi*, to consider claim because it was not raised in initial brief); see also *Thompson* v. *United States*, 535 U.S. 1114 (2002) (No. 01-8603) (challenging application of rule to bar consideration of ex post facto claim). There is no reason for a different result in this case.

3. This Court has granted, vacated, and remanded for further consideration in light of *Booker* in other cases raising the same issue. See *Hembree* v. *United States*, No. 04-1210, 2005 WL 575559 (June 13, 2005); *Dixon* v. *United States*, No. 04-8932, 2005 WL 540062 (June 6, 2005); *Levy* v. *United States*, No. 04-8942, 2005 WL 540692 (June 6, 2005). Because the court of appeals confirmed in *Dockery* that a remand for further consideration in light of *Booker* does not alter the court of appeals' application of its longstanding rule that issues not raised in an appellant's opening brief are deemed abandoned, see 401 F.3d at 1262, there is no reason for this Court to remand petitioner's case for reconsideration in light of *Booker*. Accord, *e.g.*, *United States* v. *Mosley*, No. 04-11189, 2005 WL 1317026 (11th Cir. June 2, 2005) (reinstating original judgment after this Court granted certiorari, vacated judgment, and remanded for further consideration in light of *Booker*); *United States* v. *Scott*, 128 Fed. Appx. 96 (11th Cir. 2005) (same); see also *Taylor*, 2005 WL 1155245 (on remand from this Court for

reconsideration in light of *Booker*, Fifth Circuit reinstated original judgment because defendant raised *Booker* argument for the first time in petition for a writ of certiorari and "extraordinary circumstances" did not warrant relief); *Lewis*, 2005 WL 1394949 (same).

4. Petitioner also contends (Pet. 22-27) that the district court committed reversible plain error by allowing the prosecution to introduce testimony at his criminal trial on settlement negotiations in a related civil law suit. Because petitioner did not timely object to the testimony at trial, that claim is reviewed only for plain error. See *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997). To prevail under that standard, petitioner must demonstrate that there was "(1) 'error' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' * * * If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Id.* at 467 (quoting *Olano*, 507 U.S. at 732). That standard has not been met here.

Three circuits have held that Rule 408 does not apply to criminal cases. See *United States* v. *Logan*, 250 F.3d 350, 367 (6th Cir.) (holding that "the plain language of Rule 408 makes it inapplicable in the criminal context."), cert. denied, 534 U.S. 895, 997 (2001); *Manko* v. *United States*, 87 F.3d 50, 54-55 (2d Cir. 1996) (holding that "[t]he policy favoring the encouragement of civil settlements, sufficient to bar their admissions in civil actions, is insufficient * * * to outweigh the need for accurate determinations in criminal cases where the stakes are higher"); *United States* v. *Prewitt*, 34 F.3d 436, 439 (7th Cir. 1994) ("Nothing in Rule 408 specifically prohibits the receipt of evidence in criminal proceedings concern-

ing the admissions and statements made at a conference to settle claims of private parties."). As petitioner notes (Pet. 24), two other circuits have reached the contrary conclusion. See *United States* v. *Bailey*, 327 F.3d 1131, 1144 (10th Cir. 2003) (holding that Rule 408 applies to criminal and civil trials); *United States* v. *Hays*, 872 F.2d 582, 588-589 (5th Cir. 1989) (same). The Eleventh Circuit has not yet resolved the question; the unpublished summary disposition below did not indicate whether the court's resolution of this claim was based on its conclusion that Rule 408 is inapplicable to criminal cases (and thus there was no "error" in this case), or that relief was inappropriate under one of the other elements of plain-error review. See Pet. App. 2.

Further review is not warranted in this case. To begin with, petitioner has not established that any error was "clear" or "obvious." *Johnson*, 520 U.S. at 467. Although the Federal Rules of Evidence generally apply to criminal proceedings as well as civil ones, see Fed. R. Evid. 1101(b), the text of Rule 408 states that evidence of offers to compromise a claim are "not admissible to prove *liability for or invalidity of the claim* or its amount." Fed. R. Evid. 408 (emphasis added). The rule explicitly states that "[t]his rule does not require exclusion when the evidence is offered for another purpose." *Ibid.* Guilt for a criminal offense "do[es] not in ordinary parlance constitute * * * a 'claim' over which there is a dispute as to 'validity' or amount.'" *United States* v. *Baker*, 926 F.2d 179, 180 (2d Cir. 1991); cf. also Fed. R. Evid. 408 advisory committee notes to 1972 proposed rules ("An effort to 'buy off' the prosecution or a prosecuting witness in a criminal case is not within * * * the rule of exclusion."). Thus, any error was not "plain." See *United States* v. *Garrow*, 232 F.3d 831, 835 (11th

Cir. 2000) (error cannot be "plain" where Supreme Court has not resolved the issue and courts of appeals are divided), cert. denied, 534 U.S. 830 (2001); *United States* v. *Williams*, 53 F.3d 769, 772 (6th Cir. 1995) ("[a] circuit split precludes a finding of plain error"), cert. denied, 516 U.S. 1120 (1996).

Morever, petitioner has not demonstrated that he would be entitled to relief even under the rule he advocates, because he has not shown that any error affected his substantial rights. The evidence of petitioner's guilt was overwhelming. Despite the fact that he was unemployed for most of the time he was involved with Searcy, and despite the fact that Searcy only earned approximately $40,000 per year, see Gov't C.A. Br. 13, petitioner took part in the purchase of more than a million dollars of luxury goods and real estate for his use. See *id.* at 7. Neal and Associates checks worth hundreds of thousands of dollars were altered to make them payable to petitioner and deposited into petitioner's accounts. *Ibid.* The evidence at trial demonstrated that petitioner blackmailed Searcy to make her continue to embezzle funds to support his lavish lifestyle. *Id.* at 12. That petitioner was involved in the fraud, and not simply the unknowing beneficiary of Searcy's largesse, is also demonstrated by the fact that, in applying for loans to purchase his speedboat and two airplanes, petitioner falsely claimed to be a project manager for Neal and Associates earning between $84,000 and 108,000 per year. *Id.* at 8-13. Petitioner therefore cannot demonstrate that the claimed error "affected the outcome of the district court proceedings," *Olano*, 507 U.S. at 734, much less that the error so "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings" that it warrants discretionary relief under Rule 52(b). *Id.* at 736.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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